Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THE REPUBLIC OF HONDURAS, THE REPUBLIC OF ECUADOR and THE REPUBLIC OF BELIZE,

Petitioners,

vs.

PHILIP MORRIS COMPANIES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the common law "revenue rule", which bars the enforcement of foreign tax judgments, prohibit actions brought by foreign sovereigns in United States' courts under United States' statutes, for unlawful conduct occurring in the United States?

2. Even if the revenue rule would otherwise apply, is it preempted by the plain language of RICO?

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is reported at 341 F.3d 1253. The opinion of the district court (App. 22) is reported at 100 F. Supp.2d 31.

JURISDICTION

The Court of Appeals' judgment was entered on August 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Chapter 96; of 18 U.S.C. Chapter 63, Crimes and Criminal Procedure; and of 31 U.S.C. Chapter 31, Money and Finance, are set forth in the Appendix.

INTRODUCTION

The Petitioners, Plaintiffs below, are three foreign governments which invoked United States law in a United States court, challenging criminal conduct allegedly committed primarily in the United States by the major tobacco companies and their parent corporations – almost all of them United States corporations. They charged the Defendants – called "Big Tobacco" by the Court of Appeals (App. 4) – with violating RICO by engineering a criminal conspiracy to avoid the three Republics' import taxes by smuggling cigarettes into their countries and selling them

at prices competitive with domestically-manufactured cigarettes (see App. 5).

Because the damages sought by the Plaintiffs would be measured in part by the import taxes they should have collected, and notwithstanding that the plain language of RICO gives the Plaintiffs standing to sue for the alleged fraudulent conspiracy, the Court of Appeals held that RICO's unambiguous language is supplanted by the common-law "revenue rule", which was created and intended to prevent the enforcement of foreign tax judgments in the United States. It relied primarily on *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2nd Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002). A month earlier, however, the United States Court of Appeals for the Fourth Circuit, sitting *en banc* in *United States v. Pasquantino*, 336 F.3d 321, 326-31 (4th Cir. 2003), had disagreed with *Attorney General of Canada* in holding that a federal criminal prosecution for violating Canada's tax laws was not forbidden by the revenue rule. *Pasquantino* based this holding not on any attempted distinction between criminal and civil actions under U.S. law, but rather on the ground that the wire fraud statute, 18 U.S.C. §1343 – which is also a basis for the RICO claims brought here – "on its face, criminalizes the Defendants' conduct in engaging in a scheme to defraud Canada and the Province of Ontario of tax revenue," id. at 326; and after examining the origins and history of the revenue rule, "we cannot presume that when Congress enacted the wire fraud statute in 1952, it did so with the intent that any prosecution thereunder would not involve recognition or observance of the revenue laws of a foreign sovereign. . . . Without such a presumption, we have no basis

upon which to ignore the plain language of the wire fraud statute . . . . " Id. at 330.

In this Petition, the Republics of Honduras, Ecuador and Belize will argue that a pure split in the circuits has opened, and that the view expressed in *Pasquantino* is correct. First, the common law revenue rule was never intended to preclude the prosecution of actions against American corporations for conduct in the United States which violates U.S. statutory law. Whether or not the penalties extracted in such cases are measured in part by lost tax revenues, no purpose underlying the revenue rule is served by insulating such corporations from accountability for their actions. Second, even if it could be argued that the broadest definition of the revenue rule would extend to such actions, as the court in *Pasquantino* recognized, its applicability has never been established with such force and clarity as to supplant Congress' plain language in enacting both the underlying criminal statutes which were violated in this case, and the RICO statute which creates the Plaintiffs' causes of action.

STATEMENT OF THE CASE

The Plaintiffs' complaints were dismissed on the pleadings. Ecuador's complaint (R-98) is representative of the other two. It alleges that *ad valorem* surcharges and taxes are not only a source of revenue, but a means of regulating tobacco products (id. at 32). In all three countries, tobacco products destined for export are not subject to levies, but must be documented by the manufacturer as a product not to be consumed in Ecuador (id.). The Plaintiffs charge duty on tobacco products intended for domestic

consumption, which has the effect of discouraging domestic use by making the product more costly, and enhancing local revenues (id. at 33). As the Court of Appeals recognized (App. 5), the complaint charges Big Tobacco with smuggling its products into the Plaintiff nations "to avoid the taxes and then laundering the resulting profits through various illegal money laundering channels"; and with "moving tobacco through free-trade zones and then selling it to drug smugglers, who presumably smuggled the tobacco into the Republics as part of their own money laundering operations."

Thus the Reynolds Defendants, for instance, set up subsidiaries to evade product tracking regulations (R-98-36); and its "individual country manager", a Florida resident, helped establish the smuggling network for R.J.R. cigarettes (id. at 38) through relationships which included laundering the proceeds of illicit narcotics sales (id. at 40-41). As a result, its Miami bank accounts were frozen by U.S. law enforcement officers in drug raids (id. at 40). The Philip Morris Defendants allegedly utilized cigarette smuggling activities as a means of laundering drug money, and its U.S. bank accounts too were frozen by drug enforcement agencies (id. at 40-50). The other Big Tobacco Defendants participated in the conspiracy (id. at 63). The result not only deprived the Plaintiff Republics of tax revenues, but also frustrated anti-smoking efforts, particularly among children, necessitating the expenditure of public funds to discourage consumption and significant losses of productivity (id. at 67-68).

The district court dismissed the three actions under the revenue rule, holding that it would "elevate form over substance to draw a formal distinction between an action based entirely on [foreign] tax law and one that pleads

violations of [foreign] law, but asserts a cause of action under United States and Florida law" (App. 34). The Court of Appeals agreed, holding that it is "the substance of a claim, not the form, that is important under the revenue rule" (App. 7); that "Big Tobacco's schemes to avoid the Republics' tax laws is at the heart of all of their claims" (App. 8); and that enforcement of the rule was appropriate so that a U.S. court will not be required to "enforc[e] policy choices of a foreign sovereign that might run counter to its own" (App. 9); to "prevent[ ] one sovereign from asserting its political will in another sovereign" (App. 9) (a consideration which it recognized would "disappear completely" "[i]f the political branches were to make such an allowance" (App. 10)); and to avoid usurpation by the courts of matters reserved for the political branches of government (App. 11-12). Although it recognized that RICO unambiguously expresses the judgment of a political branch of government, the court held that the revenue rule was sufficiently established and certain when Congress enacted RICO that the rule survives absent explicit statutory language preempting it (App. 12-14).

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Decision Perpetuates an Inter-Circuit Split on the Permissible Scope of the Common Law Revenue Rule.

The Court of Appeals' holding is that "a long-standing common law rule that prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign," out of "respect for sovereignty and the separation of powers," usurps an action against U.S. Defendants for violating U.S. law in the United States. In fact the rule

announced by the court below is neither long standing nor necessitated either by respect for United States' sovereignty or a proper separation of judicial power from the prerogatives of the executive and legislative branches. Indeed, the rule announced would close U.S. courts to suits by friendly foreign sovereigns in a self-abnegation of judicial authority consistently rejected by this Court in the context of analogous justiciability principles like the act of state and political question doctrines.

1. The origins of the revenue rule under English common law are by no means clear, but its purpose is undisputed: to prevent the enforcement of foreign tax and penal *judgments* by United States courts. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413 (1964); *Restatement (Third) Foreign Relations Law of the United States* §483 (1987) ("Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines or penalties rendered by the courts of other states"). Thus the rule was created as an exception to principles of conflicts of law or private international law, precluding the enforcement of foreign tax judgments which would otherwise warrant international comity. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 740 n.3 (1988) (Brennan, J., concurring); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). This Court has never considered the revenue rule as a bar to an independent action in United States courts, seeking relief under a U.S. statute for unlawful conduct occurring in this country.

Thus the rule articulated by the Court of Appeals has no hoary pedigree, nor any compelling policy basis. To the contrary, such an expansion, triggered by the "substance" of the suit, App. 7 (quoting *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 130 (2nd

Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002), and *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996), *cert. denied*, 519 U.S. 905 (1996)), can only be traced to a stray comment in a concurrence by Judge Learned Hand in the 1929 decision, *Moore v. Mitchell*, 30 F.2d 600 (2nd Cir. 1929), *aff'd*, 281 U.S. 18 (1930), noting that the question of whether to permit an independent action under a foreign revenue statute, as distinct from enforcing the foreign sovereign tax judgment, "has never been passed on by a federal court." 30 F.2d at 603 (Hand, L., concurring). Nevertheless, Judge Hand believed that any action by a foreign sovereign for "liabilities for taxes" should be precluded.

The modern invocation of the rule has also been traced to a Ninth Circuit decision in *Her Majesty the Queen in Right of Province of British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979), relying on *Moore v. Mitchell*, which pronounced that "while the reasoning [of *Moore*] no longer prevents a state from enforcing its tax judgment in the courts of a sister state because of the full faith and credit clause, this same rationale has continued validity in the international context." But *Gilbertson* involved recovery on a judgment issued by a British Columbia court for tax violations in Canada, and not on an independent action in a U.S. court under U.S. law. Id. at 1161; see id. at 1164 ("if the court below was compelled to recognize the tax judgment from a foreign nation, it would have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do") (citing *Sabbatino*, 376 U.S. at 448 (White, J., dissenting)).

From these slim reeds have come the significant expansions effected by the decision below and *Attorney*

General of Canada, 268 F.3d 103, and even extensions to bar federal criminal prosecutions, see *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 519 U.S. 905 (1996) (also cited by the court below, App. 7). *Boots*, at least, recognized no principled difference between criminal and civil statutory actions in the course of enforcing the rule, nor did the court in *Pasquantino* in rejecting it, 336 F.3d at 330-31 (see also *Attorney General of Canada*, 268 F.3d at 109 (Calabresi, J., dissenting)). But other courts have excepted criminal prosecutions from the revenue rule because they reflect the sanction of a political branch of government – a rationale which applies no less to RICO. See *United States v. Pierce*, 224 F.3d 158, 163 (2d Cir. 2000); *United States v. Trapilo*, 130 F.3d 547, 549 (2nd Cir. 1997), *cert. denied*, 525 U.S. 812 (1998). See also United States' Opposition in *Attorney General of Canada* (Docket 01-1317) at 16.

In these disparate approaches, the Courts of Appeals have acknowledged this Court's lack of guidance on the proper scope of the revenue rule. The Second Circuit Court in *Attorney General of Canada* observed: "Although the United States Supreme Court . . . ha[s] not ruled on the precise scope of the rule, they have acknowledged its continuing vitality in the international context." 268 F.3d at 109 (citing Justice Brennan's concurrence in *Sun Oil*, 486 U.S. at 740 n.3; *Sabbatino*, 376 U.S. at 413-14; and language of other cases which the court acknowledged have since been overruled). The Fourth Circuit Court in *Pasquantino* likewise noted that "the Supreme Court has never passed upon the precise scope of the common law revenue rule," 36 F.3d at 327, in rejecting any reliance on *Sabbatino* as a basis for an expansive version of the revenue rule. See id. at 327-28. Finally, the Ninth Circuit

Court's ruling in *Gilbertson*, ostensibly affirming the revenue rule in its original form, expressed some doubts about the full contours of the doctrine. 587 F.2d at 1165.

The circuits are thus in manifest disarray as to the "proper scope" of the revenue rule. One circuit (the First, in *Boots*) applied the rule to bar even criminal prosecutions brought by the federal government ostensibly related to a foreign sovereign's tax collections. Two circuits (the Fourth in *Pasquantino* and the Second in *Trapilo*) have held that the revenue rule does not bar such criminal prosecutions, but for contradictory reasons. The Second (in *Attorney General of Canada*) and the Eleventh (in the decision below) have applied the revenue rule to categorically bar civil actions brought by foreign sovereigns under U.S. statutes, if those claims somehow implicate their taxes. The Ninth to date (in *Gilbertson*) has properly limited the rule to its original contours – as a bar only to the enforcement of tax judgments by foreign courts. Without guidance from this Court, lower courts have only stray dicta and faulty analogies from other justiciability doctrines by which to appraise a progressively broader array of civil and criminal proceedings involving foreign sovereigns and their revenue interests.[1]

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[1] The United States opposed review in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.* (Docket 01-1317), *cert. denied*, 537 U.S. 1000 (2002), largely on two grounds. The first was that only the Second Circuit Court had ruled on this particular version of the revenue rule. Brief for the United States as Amicus Curiae, at 15. Second, it argued that criminal prosecutions by the federal government were available to vindicate the rights otherwise rendered nonjusticiable by the revenue rule in civil actions. See id. at 15-16. As several Courts of Appeals have noted, see supra p. 8, this distinction is indefensible, or

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2. Without anticipating the merits of the argument, suffice it to say here that the extreme version of the rule announced by the Eleventh Circuit Court subverts settled expectations as to access by foreign sovereigns to U.S. courts and runs contrary to this Court's pronouncements on the limits of justiciability for cases implicating foreign relations. If left unreviewed, the decision below would close the doors of U.S. courthouses to friendly foreign governments and conceivably give rise to new forms of the act of state and political question doctrines that have not been countenanced by this Court in nearly half a century.

a. The decision below, see App. 9-12, as in *Attorney General of Canada*, based its expansive version of the revenue rule on the twin principles of respect for U.S. sovereignty and deference to the political branches. See 268 F.3d at 111-22. Even though their misapplications of these doctrines have been challenged, see id. at 124-26, 136-40 (Calabresi, J., dissenting); *Pasquantino*, 336 F.3d at 327-31, their abdication of federal justiciability is now the prevailing standard in two Circuits. Their holdings stand in sharp contrast to overriding principles of federal justiciability.

Mindful that the revenue rule has always been discretionary,[2] the sweeping and categorical prohibition

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at least unsettled. Given the growing conflict in the circuits as to the proper scope of the revenue rule, the United States' contentions may have been overtaken by events.

[2] A United States "court *need not* give effect to the penal or revenue laws of foreign countries." *Sabbatino*, 376 U.S. at 413-14 (emphasis added). See *Trapilo*, 130 F.3d at 550 ("our courts will *normally* not enforce foreign tax judgments") (emphasis added); *Boots*, 80 F.3d at 587 ("our courts have traditionally been *reluctant* to enforce

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mandated by the Court of Appeals in the instant case should be strictly scrutinized. The only appropriate rule of such dignity, enshrined in the Constitution itself, is that federal courts are open to the suits of foreign sovereigns as plaintiffs. See U.S. Const. Art. III, §2, cl. 1. See also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); *National City Bank v. Republic of China*, 348 U.S. 356 (1955). This Court has consistently affirmed this principle, consistent with concerns of state sovereign immunity, see *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), in the construction of statutes under which a foreign sovereign may seek relief. See *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978). The decision of the court below is utterly insensitive to the concern that, as a matter of comity and reciprocity, United States courts should be kept open for suits brought by foreign sovereigns under U.S. laws, in the same way that we would expect foreign tribunals to welcome actions initiated by the United States government. Any version of the revenue rule to be countenanced by this Court should be consistent with these principles. It should draw the line between actions to enforce foreign tax judgments or laws on the one hand, and actions to enforce U.S. laws on the other.

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foreign revenue laws") (emphasis added); *Restatement (Third) of Foreign Relations Law* §483 (1987) ("Courts in the United States are *not required* to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states") (emphasis added). All of this is consistent with the original conflicts of law purposes of the revenue rule, as merely a public policy ground for declining to recognize and enforce foreign tax judgments.

b. If the revenue rule's ostensible solicitude to derogations of U.S. sovereignty is illusory, so too is its siren call for the abdication of judicial authority in a wide class of cases brought by foreign sovereigns. The Eleventh Circuit Court concluded that although the revenue rule originally was a "prudential common law doctrine," App. 11, it has now been transformed into a principle of "constitutional significance." Id. Indeed, the court appeared to go further than *Attorney General of Canada*, see 268 F.3d at 113-15, in giving the revenue rule a constitutional dimension rooted in separation of powers principles. It linked the revenue rule with both the political question and act of state doctrines, see App. 11 (citing *Baker v. Carr*, 369 U.S. 186, 212 n.31 (1962) (political questions), and *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (acts of state)), by declaring that any attempt by a foreign sovereign to enforce its tax laws in the United States "'directly implicates relations between our country and other sovereign nations' . . . primarily because tax laws are regarded as embodying a nation's social and political policy choices [and] [t]herefore, questions regarding whether and to what extent the federal government should provide for the enforcement of foreign tax laws in domestic courts are necessarily allocated to the political branches for resolution." App. 11-12 (quoting *Attorney Gen. of Canada*, 268 F.3d at 111, 114).

But the Eleventh Circuit Court's enunciation of an overweening revenue rule has no basis in this Court's contemporary jurisprudence of the political question and act of state doctrines. For example, its reliance on *Baker v. Carr* is simply misplaced. In that decision, this Court went out of its way to disclaim the notion that all matters of foreign relations implicated nonjusticiable political questions:

> [I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

369 U.S. at 211-12. See *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986) ("But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones"); *Haig v. Agee*, 453 U.S. 280, 292 (1981).

The Eleventh Circuit Court's invocation of the act of state doctrine, through its citation of the *Oetjen* case, App. 11, is most questionable, because *Oetjen* holds only that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). Nothing in this doctrine speaks to the capacity or competence of a court in the United States to rule on the merits of a claim brought by a foreign government pursuant to a U.S. statute, for conduct occurring in *this* country. And while the act of state doctrine reached its high watermark as a constitutional principle of separation of powers in this Court's decision in *Sabbatino*, 376 U.S. at 401, subsequent decisions of this Court have seen it recede, in much the way Justice White predicted in his *Sabbatino* dissent. See 376 U.S. at 448 & n.9 (White, J., dissenting). Instead of embracing a sweeping rule of

constitutional dimension, this Court has recently held that the doctrine instead articulates a "'principle of decision binding on federal and state courts alike.'" *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (quoting *Sabbatino*, 376 U.S. at 427). Under the act of state doctrine, "'the act within its own boundaries of one sovereign State . . . becomes . . . a rule of decision for the courts of this country.'" Id. (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)). Moreover, "[a]ct of state issues only arise when a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." Id.

It would be incongruous for this Court to countenance an expansive version of the revenue rule, usurping Congressional will and federal justiciability, when it has explicitly disavowed broad formulations of the act of state and political question doctrines that would prevent federal courts from deciding cases, in the normal course, involving foreign sovereigns and foreign relations issues. Where, as here, at stake is a foreign sovereign's traditional access to federal courts, the vindication of its rights under U.S. statutes, and the redress of injuries caused by conduct occurring in this country, there is no principled ground to extend the revenue rule in a manner inconsistent with its common law history and purpose.

2. Even if the Revenue Rule Would Otherwise Apply, It is Preempted by the Plain Language of RICO.

1. RICO's unambiguous language creates the pleaded cause of action. Section 1964(c) of RICO provides

that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue therefore in any appropriate United States district court . . . . " No court has ever denied that a foreign nation is a "person" under RICO, or that the claims here seek damages for injuries to "business or property." The Plaintiff Republics alleged violations of §1962 – mail fraud, wire fraud, money laundering and other predicate acts, as well as conspiracies to act, devised and nurtured in the United States, mostly by United States' private Defendants. RICO's language must be "liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, §904(a), 84 Stat. 947 (1970). See *Rotella v. Wood*, 528 U.S. 549, 557 (2000); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985).

The plain language of §§1962 and 1964(c) is supported by numerous provisions of RICO and other federal statutes. Section 1956(c)(7)(B)(vi) makes it a crime, and a predicate act under RICO, to commit "an offense against a foreign nation" under foreign law, "with respect to a financial transaction occurring in whole or in part in the United States," if it is "an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States." "[O]ffenses under foreign law" include prohibitions which cover cigarette smuggling and money laundering, reflecting the judgment of our political branches that such wrongs against foreign nations should be redressed in our courts. Money laundering through foreign banks is forbidden under 18 U.S.C. §1961(1)(G); foreign sovereigns are authorized to prevent money laundering through foreign banks (§1956(c)(6)); and

the U.S. has promised to "assist . . . *foreign* law enforcement and regulatory authorities" in combating money laundering that violates "criminal and *tax* laws", 31 U.S.C. §310(b)(2)(F) (emphasis added). Thus the language of RICO and analogous statutes explicitly authorize "foreign law enforcement" of "tax laws." In adopting the U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, the Congress both reaffirmed that RICO creates the cause of action pleaded here, and rejected an amendment proposed by Big Tobacco which would have precluded "any civil action or claim for monetary damages for the nonpayment of taxes or duties under the revenue laws of a foreign state . . . . " 147 Cong. Rec. H6925 (daily ed. Oct. 17, 2001). See 147 Cong. Rec. H7159 *et seq.* (daily ed. Oct. 23, 2001); 147 Cong. Rec. E1936 (daily ed. Oct. 29, 2001); 147 Cong. Rec. S11027 *et seq.* (daily ed. Oct. 25, 2001).

2. RICO's plain language controls. Statutory construction begins with the literal language of a statute, see *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); and it also ends there unless the language is ambiguous, id., or would contravene express legislative intention. *Russello v. United States*, 464 U.S. 16, 20 (1983). When a statute "speak[s] directly" to a question addressed by the common law, the common law must yield. *United States v. Texas*, 507 U.S. 529, 534 (1993). See *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313-14 (1981) ("When Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking of federal courts disappears"). The "interpretative presumption" that "Congress is understood to legislate against the background of common-law adjudicatory principles . . . is not . . . one that

entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citation omitted). A common law rule will not be presumed to limit the scope of a federal statute where Congress has "expressly or impliedly" evinced "any intention on the issue." Id. at 110. Accord, *United States v. Texas*, 507 U.S. 529, 534 (1993) ("Congress need not 'affirmatively proscribe' the common-law doctrine at issue") (citation omitted). These declarations necessarily elevate the plain language of RICO above the revenue rule, even if that rule unambiguously extended to the Plaintiffs' statutory claims.

3. Even if the absence of language in RICO addressing the revenue rule required judicial scrutiny beyond its plain language, the revenue rule was not sufficiently settled at the time of RICO's enactment to supplant its unambiguous language. If the foregoing discussion of the origins of the revenue rule does not establish that it has never extended to usurp actions under U.S. law, at the least it establishes that the rule has never unambiguously done so. The very decisions cited by the Court of Appeals (App. 13) hold only that "where a common-law principle is *well established* . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident,'" *Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. at 108 (emphasis added), quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). In the instant case, even apart from the prior argument that the language of RICO and related statutes unambiguously preempts any otherwise-applicable common law

precept, at the least the conclusion is inescapable, as the court held in *Pasquantino*, that the revenue rule was not sufficiently "well established" in its application to the Plaintiffs' claims as even to warrant inquiry into Congress' intentions. If the numerous circuit conflicts establish nothing else, they certainly illustrate the unsettled reach of the revenue rule. For this reason too, the Court of Appeals' decision requires this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 5, 2003

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-11727

D. C. Docket No. 01-02847 CV-FAM

REPUBLIC OF HONDURAS,

Plaintiff-Appellant,

versus

PHILIP MORRIS COMPANIES, INC.,
PHILIP MORRIS USA, INC.,
f.k.a. Phillip Morris Incorporated, et al.,

Defendants-Appellees.

No. 02-11728

D.C. Docket No. 01-05113 CV-FAM

REPUBLIC OF ECUADOR,

Plaintiff-Appellant,

versus

PHILIP MORRIS INTERNATIONAL INCORPORATED,
PHILIP MORRIS COMPANIES INC., et al.

Defendants-Appellees.

No. 02-11733

D.C. Docket No. 01-05115 CV-FAM

REPUBLIC OF BELIZE,

Plaintiff-Appellant,

versus

PHILIP MORRIS INTERNATIONAL, INC.,
PHILIP MORRIS COMPANIES INC., et al.,

Defendants-Appellees.

No. 02-11734

D.C. Docket No. 01-05117 CV-FAM

REPUBLIC OF HONDURAS,

Plaintiff-Appellant,

versus

PHILIP MORRIS INTERNATIONAL, INC.,
PHILIP MORRIS COMPANIES INC., et al.,

Defendants-Appellees.

No. 02-11735

D.C. Docket No. 01-01936 CV-FAM

REPUBLIC OF ECUADOR,

Plaintiff-Appellant,

versus

PHILIP MORRIS COMPANIES, INC.,
PHILIP MORRIS USA INC., f.k.a.
Philip Morris Incorporated, et al.,

Defendants-Appellees.

No. 02-11736

D.C. Docket No. 01-02846 CV-FAM

REPUBLIC OF BELIZE,

Plaintiff-Appellant,

versus

PHILIP MORRIS COMPANIES, INC.,
PHILIP MORRIS USA INC., f.k.a.
Philip Morris Incorporated, et al.

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(Filed August 14, 2003)

Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and HODGES*, District Judge.

DUBINA, Circuit Judge:

In this appeal, we address the issue of whether the revenue rule prevents a foreign sovereign from bringing suit in federal court for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") involving schemes to avoid the sovereign's tax laws. This case is the consolidation of six separate appeals. The Republics of Belize, Honduras and Ecuador ("The Republics") brought claims against the Appellees ("Big Tobacco") for violations of RICO, as well as state and common law claims. The Republics now appeal the district court's order granting Big Tobacco's Rule 12(b)(6) motion to dismiss their claims based on the common law revenue rule. After reviewing the record and having the benefit of oral argument, we agree with the district court and hold that the revenue rule requires abstention from passing judgment on the Republics' claims. Accordingly, we affirm the district court's judgment of dismissal.

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

I. BACKGROUND FACTS

The Republics make various claims regarding the facts underlying this case, but all of the claims follow a common pattern. All of the Republics tax tobacco products as a means of regulating smoking in their various countries and providing funds for anti-smoking activities. The Republics allege that Big Tobacco engaged in various illegal schemes to avoid paying these taxes.

The form of the schemes varied. Some of the schemes involved smuggling tobacco into the Republics to avoid the taxes and then laundering the resulting profits through various illegal money laundering channels. Others involved moving tobacco through free-trade zones and then selling it to drug smugglers, who presumably smuggled the tobacco into the Republics as part of their own money laundering operations. Regardless of the specific scheme employed, the Republics allege that all of the tobacco companies conspired in one way or another to evade the Republics' taxes in order to protect Big Tobacco's profits and lower prices to consumers in the Republics in order to ensure that the taxes did not deter consumers from smoking.

All of Big Tobacco's alleged schemes, which form the predicate acts to the Republics' RICO claims, were targeted at avoiding the taxes the Republics placed on tobacco imported into their respective countries.

II. STANDARD OF REVIEW

"We review a dismissal pursuant to Rule 12(b)(6) *de novo,* applying the same standard as the district court did." *Hoffman-Pugh v. Ramsey,* 312 F.3d 1222, 1225 (11th Cir. 2002).

III. DISCUSSION

This case requires us to determine whether the revenue rule applies in this circuit and, if it does, whether it requires us to abstain from considering the civil RICO claims that the Republics brought to remedy Big Tobacco's schemes to avoid the Republics' taxes.

A. The Revenue Rule

The revenue rule is a long-standing common law rule that prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign.[1] Although 18th century English courts originally developed the rule to protect British trade,[2] it has a long history of recognition and application in this country.[3] The rule was originally justified in England on the basis of nationalistic commercial protectionism,[4] but its application in this country is based and justified on the grounds of respect for sovereignty and the separation of powers. *Attorney Gen. of*

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[1] *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001); *Moore v. Mitchell*, 30 F.2d 600, 603-604 (2d Cir. 1929) (Hand, J. concurring); *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (K.B. 1779) (Lord Mansfield) ("One nation does not take notice of the revenue laws of another."); *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) (Lord Mansfield) ("no country ever takes notice of the revenue laws of another.").

[2] *See* Barbara A. Silver, Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments, 22 GA. J. OF INT'L & COMP. L. 609, 613-616 (1992) (discussing the history of the revenue rule).

[3] *Attorney Gen. of Canada*, 268 F.3d at 109-11; *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1164-65 (9th Cir. 1979); *Moore*, 300 F.2d at 603-604 (Hand, J. concurring); *Ludlow v. Van Rensselaer*, 1 Johns. 94 (N.Y. 1806).

[4] Silver, *supra* note 2, at 613-616.

Canada, 268 F.3d at 109; *Moore,* 30 F.2d at 604 (applying the revenue rule in the context of an intra-state tax dispute). This circuit has not previously considered or adopted the rule. We now recognize the continuing vitality of the revenue rule, adopt it as the rule of this circuit and apply it to the facts of this case.

1. Substance over form

We initially recognize that it is the substance of a claim, not the form, that is important under the revenue rule. *Attorney Gen. of Canada,* 268 F.3d at 130 ("What matters is not the form of the action, but the substance of the claim."); *United States v. Boots,* 80 F.3d 580, 587 (1st Cir. 1996) ("Where a domestic court is effectively passing on the validity and operation of the revenue laws of a foreign country, the important concerns underlying the revenue rule are implicated."); *see also United States v. Harden,* [1963] S.C.R. 366, 372-373 (Can.); *Sydney Mun. Counsel v. Bull,* 1 K.B. 7 (1909). If it were otherwise, litigants could freely avoid the impact of the revenue rule by bringing tax claims under the guise of non-tax-related causes of action. That is precisely what the Republics are attempting to do here. We agree with the Second Circuit in rejecting this approach. *See Attorney Gen. of Canada,* 268 F.3d at 131 ("Canada would have a United States court require defendants to reimburse Canada for its unpaid taxes, plus a significant penalty due to RICO's treble damages provision. Thus, Canada's object is clearly to recover allegedly unpaid taxes.").

The Republics' claims fundamentally deal with the adjudication of foreign tax claims. Although the Republics' frame their claims as civil RICO violations, their complaints

make clear that Big Tobacco's schemes to avoid the Republics' tax laws is at the heart of all of their claims. Taking the Republics' allegations as true, all of their claims of wire fraud, mail fraud and money laundering involve schemes to avoid paying taxes and seek to collect these unpaid taxes.

The revenue rule applies whether the Republics seek to redress these alleged violations through civil RICO or direct tax claims. *Attorney Gen. of Canada,* 268 F.3d at 131, *quoting United States v. Harden,* [1963] S.C.R. 366, 372-373 (Can.) ("For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction."). Furthermore, the revenue rule applies regardless of whether the Republics frame their damages as the direct loss of tax revenue or the indirect effects of such lost revenue, such as increased law enforcement costs or increased costs of combating smoking. 1 Dicey & Morris, *The Conflict of Laws* 91 (13th ed. 2000) ("Indirect enforcement occurs where a foreign State (or its nominee) in form seeks a remedy, not based on the foreign rule in question, but which in substance is designed to give it extra-territorial effect . . . ."); *see Attorney Gen. of Canada,* 268 F.3d at 130-33.

Therefore, we hold that the Republics' civil RICO claims implicate the revenue rule because, in substance, they seek redress for violations of the Republics' tax laws.

2. Respect for Sovereignty

"Tax laws embody a sovereign's political will. . . . They mirror the moral and social sensibilities of a society." *Attorney Gen. of Canada,* 268 F.3d at 111. The revenue rule exists to prevent the courts of a sovereign nation from enforcing policy choices of a foreign sovereign that might run counter to its own. *Moore,* 30 F.2d at 604 (Hand, J. concurring) ("No court ought to undertake an inquiry which it cannot prosecute without determining whether [another sovereign's] laws are consonant with its own notions of what is proper."); *see also Attorney Gen. of Canada,* 268 F.3d at 111-13. We find this justification for the revenue rule compelling.

The Republics' complaints make clear that their tax laws embody anti-smoking policies directed at protecting their citizens from the health hazards of smoking, both by attempting to discourage smoking by raising the price of cigarettes and by providing revenue for anti-smoking programs. While we may personally applaud the Republics' efforts in this regard, it is not our role to promote these policies by enforcing their tax laws. Because the tax laws underlying the Republics' RICO claims embody specific policy choices, we hold that the revenue rule applies to these claims and prevents us from considering them.

The revenue rule also aims to promote harmony between sovereigns by preventing one sovereign from asserting its political will in another sovereign through actions to enforce its revenue laws. *See Sabbatino,* 376 U.S. at 448, 84 S.Ct. at 950-51 (White, J. dissenting) ("our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation

to further the governmental interests of a foreign sovereign"); *see also Attorney Gen. of Canada*, 268 F.2d [sic] at 111-13. The Republics' claims directly implicate this aspect of the revenue rule because they seek to use the RICO Act as a means of enforcing the tax laws that Big Tobacco allegedly violated. If we were to provide them with the relief they seek, we would be allowing them to assert their sovereign political will, as embodied in their tax laws, in our country. This is precisely what the revenue rule exists to prevent.

We recognize that the respect for sovereignty justification for the revenue rule is not absolute because, as discussed below, the legislative and executive branches ("the political branches") of our government have the power under the Constitution to allow foreign sovereigns to enforce their policies, such as those embodied in the Republics' tax laws, in our country. *See infra* Part III.1.C (discussing the separation of power justification for the revenue rule). If the political branches were to make such an allowance, this justification for the revenue rule would disappear completely and we would have the authority to consider claims such as those brought by the Republics. However, as discussed below, the political branches have made no such allowance; and, thus, this justification for the revenue rule remains intact and requires us to abstain from considering the Republics' claims.

3. Separation of Powers

Although the revenue rule developed as a prudential common law doctrine,[5] we recognize that it has taken on constitutional significance based on the separation of powers in the Constitution. Under the Constitution, the power to conduct foreign relations is allocated to the political branches. *Baker v. Carr,* 369 U.S. 186, 212 n.31, 82 S. Ct. 691, 707 n.31, 7 L. Ed. 2d 663 (1962); *Oetjen v. Cent. Leather Co.,* 246 U.S. 297, 302, 38 S. Ct. 309, 311, 62 L. Ed. 726 (1918). While the Constitution commits issues of foreign relations to the political branches, the judiciary may consider and pass judgment on a claim that touches an issue of foreign relations where the political branches have taken prior action on that issue. *See Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 380, 69 S. Ct. 140, 142, 93 L. Ed. 76 (1948) (holding that where there was prior action by the political branches, the judiciary was able to pass judgment on the application of the Fair Labor Standards Act to a foreign geographical area even though the initial determination of the sovereignty of such foreign areas rested with the political branches).

"Extraterritorial tax enforcement directly implicates relations between our country and other sovereign nations," *Attorney Gen. of Canada,* 268 F.3d at 114, primarily because tax laws are regarded as embodying a nation's social and political policy choices. *Id.* at 111. Therefore, questions regarding whether and to what extent the federal government should provide for the enforcement of

[5] *See* Silver, *supra* note 2, at 613-616.

foreign tax laws in domestic courts are necessarily allocated to the political branches for resolution.

Furthermore, "with regard to the domestic collection of foreign taxes and the enforcement of United States taxes abroad, the political branches of our government have consistently acted on behalf of the United States in establishing and managing the nation's relationships with other countries."[6] *Id.* at 115. We recognize that in so acting, the political branches have expressed a "continuing policy preference against enforcing foreign tax laws . . . ." *Id.* at 118.

The political branches undisputedly have not entered into any type of tax treaty with any of the Republics that would allow the Republics to enforce their tax claims underlying this suit in this country. Furthermore, the political branches have not legislatively abrogated application of the revenue rule to RICO claims. *See infra* Parts III.2-3. Until such time as the political branches take action in favor of allowing extraterritorial enforcement of unadjudicated foreign tax claims in domestic courts, we lack the constitutional authority to consider such claims.

B. The revenue rule and the RICO Act

The Republics next argue that even if the revenue rule applies in this circuit, RICO preempts it. The essence of the Republics' argument is that the civil RICO statute impliedly preempts the revenue rule because its broad and

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[6] For a discussion of the history of foreign tax treaties see *Attorney Gen. of Canada*, 268 F.3d at 115-20.

plain language[7] does not contain an exception for cases involving foreign tax claims. We are not persuaded by this argument because it misapprehends basic rules of statutory interpretation.

"Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108, 111 S. Ct. 2166, 2169, 115 L. Ed. 2d 96 (1991). "Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Id.,* 501 U.S. at 108, 111 S. Ct. at 2169-70 (quoting *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294 (1952)). "Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen,* 343 U.S. at 783, 72 S. Ct. at 1014. "In order to abrogate [such] a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas,* 507 U.S. 529, 534, 113 S. Ct. 1631, 1634, 123 L. Ed. 245 (1993).

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[7] Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

18 U.S.C. § 1964(c).

Little question exists that the revenue rule is a "long-established and familiar principle."[8] *See Attorney Gen. of Canada,* 268 F.3d at 111-12 (detailing the history of the revenue rule). The RICO act does not "speak directly" to the applicability or inapplicability of the revenue rule to actions brought under it. Furthermore, the Republics have not demonstrated, nor has this court discovered, any evidence of a statutory purpose in the RICO statute that would except actions brought under it from the strictures of the revenue rule. Without such a showing, we presume that Congress originally passed, and subsequently amended, the RICO statute "against a background of common-law adjudicatory principles" that included the revenue rule "with an expectation that the principle [would] apply."[9] Therefore, the mere fact that the RICO statute is written in broad terms does not, standing alone, preempt application of the revenue rule to the Republics' RICO claims.

C. The revenue rule and the Patriot Act

The Republics next argue that portions of the recently enacted Patriot Act, USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001), which amended the RICO statute, preempt application of the revenue rule to RICO claims. They argue that the deletion of a rule of construction,[10] which would have codified the holding of *Attorney*

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[8] *Isbrandtsen,* 343 U.S. at 783, 72 S. Ct. at 1014.

[9] *Astoria Fed. Sav. & Loan Ass'n,* 501 U.S. at 108, 111 S. Ct. at 2169-70

[10] RULE OF CONSTRUCTION. – None of the changes or amendments made by the Financial Anti-Terrorism Act of 2001 shall expand the jurisdiction of any Federal or State court

(Continued on following page)

General of Canada, from the final act demonstrates sufficient legislative intent to abrogate application of the revenue rule to RICO claims such as those brought by the Republics. To support this position, the Republics point to statements by various Senators and Representatives indicating that this rule of construction was deleted specifically so as not to exempt Big Tobacco from claims such as those that the Republics bring in this case.[11]

We are not persuaded by this argument because the Republics are attempting to rely on a failed legislative proposal to show that Congress intended to abrogate a common law rule. The Supreme Court has held that the failure of a legislative proposal does not show that Congress endorsed the opposite proposition. *United States v.*

> over any civil action or claim for monetary damages for the nonpayment of taxes or duties under the revenue laws of a foreign state, or any political subdivision thereof, except as such actions or claims are authorized by United States treaty that provides the United States and its political subdivisions with reciprocal rights to pursue such actions or claims in the courts of the foreign state and its political subdivisions.

147 CON. REC. H6925 (daily ed. Oct. 17, 2001)

[11] 147 CONG. REC. H7159 (daily ed. Oct. 23, 2001) (statement of Rep. Conyers) (noting that the conference "[d]ropped [a] provision carving out tobacco companies from RICO liability for foreign excise taxes"); 147 CONG. REC. E1936-02 (daily ed. Oct. 29, 2001) (statement of Rep. Wexler) ("I am pleased that a provision earlier included in money laundering legislation, which would have inhibited RICO liability for foreign excise taxes for tobacco companies, has been dropped from the USA PATRIOT Act of 2001 . . ."); 147 CONG. REC. S10990-02 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry) ("today [we] clarify that it is the intent of the legislature that our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism.").

Estate of Romani, 523 U.S. 517, 534, 118 S. Ct. 1478, 1488, 140 L. Ed. 2d 710 (1998). As Justice Scalia explained, "Congress can no more express its will by not legislating than an individual Member can express his will by not voting." *Id.,* 523 U.S. at 536, 118 S. Ct. at 1489 (Scalia, J. concurring). Under the U.S. Constitution, the only actions of Congress that have legally operative effect are those acts that are passed by both the House and Senate and are either signed by the President or repassed by a supermajority vote to break a presidential veto. U.S. CONST. ART. 1, § 7; *Estate of Romani,* 523 U.S. at 535-36, 118 S. Ct. at 1488-89. Under this scheme, failed legislative proposals have no operative effect because they do not satisfy the bicameralism and presidential signature or veto override requirements. To give effect to such proposals would invest Congress with legislative power far beyond what the Constitution provides because Congress could shape the meaning of the law by merely introducing a proposal, removing it and having individual legislators comment on the motivation behind its removal. As Justice Scalia explained, "The act of refusing to enact a law . . . has utterly no legal effect, and thus has utterly no place in a serious discussion of the law." 523 U.S. at 535, 118 S. Ct. at 1488 (Scalia, J. concurring).

Furthermore, the legislative process is inherently political, and action taken by Congress on a specific proposal, whether positive or negative, is often the result of compromise between various competing political forces and interests. While certain Senators and Representatives might state one motivation for taking action on such a proposal, such statements do not necessarily capture the full and accurate picture of the political process underlying the proposal's fate. Given the myriad of potential reasons

behind a proposal's failure, we would be wading into very dangerous waters if we were to accord legally operative effect to a failed legislative proposal based on statements made by a handful of legislators.

Therefore, we follow *Estate of Romani* and look only to those portions of the Patriot Act that Congress passed and the President signed to determine whether the Patriot Act had any effect on the revenue rule in the context of civil RICO actions. After reviewing the same, we hold that the Patriot Act had no effect on the revenue rule's applicability to civil RICO actions and, therefore, the Republics' argument on this issue is without merit.

IV. CONCLUSION

For the foregoing reasons, we adopt the revenue rule as the law of this circuit. We also hold that the revenue rule requires this court to abstain from considering the Republics' claims because, not to do so, would necessarily require us to pass judgment on unadjudicated foreign tax claims for which the political branches of our government have not provided an enforcement mechanism. Finally, we hold that neither the RICO Act nor the Patriot Act altered the application of the revenue rule to such claims. Accordingly, we affirm the judgment of the district court dismissing the Republics' claims.

AFFIRMED.

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 01-1936-CIV-MORENO

THE REPUBLIC OF ECUADOR,

Plaintiff,

vs.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Defendant.

_____/

FINAL JUDGMENT

(Filed Feb. 26, 2002)

Pursuant to Fed. R. Civ. P. 58 and the Court's Order Granting Defendants' Motion to Dismiss **(D.E. No. 15)**, filed on **July 9, 2001**, it is

ADJUDGED that judgment is entered in favor of Defendants, PHILIP MORRIS COMPANIES, INC., *et al.* and against Plaintiff, THE REPUBLIC OF ECUADOR. The case, namely the entire complaint, is dismissed with prejudice. Further, it is

ADJUDGED that any pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of February, 2002.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:

[Names Omitted In Printing]

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 01-5117-CIV-MORENO

THE REPUBLIC OF HONDURAS,

Plaintiff,

vs.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Defendant.

_____/

FINAL JUDGMENT

(Filed Feb. 26, 2002)

Pursuant to Fed. R. Civ. P. 58 and the Court's Order Granting Defendants' Motion to Dismiss **(D.E. No. 20)**, filed on **January 25, 2002**, it is

ADJUDGED that judgment is entered in favor of Defendants, PHILIP MORRIS COMPANIES, INC., *et al.* and against Plaintiff, THE REPUBLIC OF BELIZE [sic] [HONDURAS]. The case, namely the entire complaint, is dismissed with prejudice. Further, it is

ADJUDGED that any pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of February, 2002.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:

[Names Omitted In Printing]

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 01-2846-CIV-MORENO

THE REPUBLIC OF BELIZE,

Plaintiff,

vs.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Defendant.

_____/

FINAL JUDGMENT

(Filed Feb. 26, 2002)

Pursuant to Fed. R. Civ. P. 58 and the Court's Order Granting Defendants' Motion to Dismiss **(D.E. No. 13)**, filed on **September 5, 2001**, it is

ADJUDGED that judgment is entered in favor of Defendants, PHILIP MORRIS COMPANIES, INC., *et al.* and against Plaintiff, THE REPUBLIC OF BELIZE. The

case, namely the entire complaint, is dismissed with prejudice. Further, it is

ADJUDGED that any pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of February, 2002.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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[Names Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 01-1936-CIV-MORENO

THE REPUBLIC OF ECUADOR,

Plaintiff,

vs.

PHILIP MORRIS COMPANIES, INC., *et al*,

Defendant.
_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Filed Feb. 26, 2002)

The Republic of Ecuador brought suit against the tobacco industry alleging Defendants engaged in an international conspiracy to evade taxes by smuggling tobacco products into its territory. At issue is whether this Court can entertain such a lawsuit or whether it must abstain under separation of powers principles. Because this Court finds that it should abstain under separation of powers, it dismisses Ecuador's suit.

I. FACTUAL BACKGROUND

A. Ecuador's Taxing Scheme

Ecuador has imposed several types of levies on tobacco products manufactured in and outside of Ecuador. It has periodically adjusted taxes on tobacco products to influence social policies and to discourage smoking. For example, the complaint indicates that in December 1989, Ecuador imposed a progressive *ad valorem* tax on tobacco

products. The progressive rate structure imposed a higher rate on cigarettes made with foreign or imported tobacco and a lower tax rate on the unfiltered domestic brand. This 1989 tax increase is believed to have engendered an increase in smuggling operations designed to avoid tax payments.

B. The Alleged Smuggling Schemes

In its amended complaint, Ecuador claims that Defendants sold enormous amounts of Ecuadorian tobacco to a small group of foreign distributors. Allegedly, these distributors used Free Trade Zones in Aruba and Panama to insulate the goods from taxation and then resold the tobacco to smugglers who transported untaxed "black market" tobacco products back into Ecuador. Ecuador also asserts that Defendants participated in a scheme to smuggle foreign grown tobacco into Ecuador without paying taxes. To further their fraudulent scheme, Ecuador claims that Defendants acted in concert with each other and formed a series of "enterprises" within the meaning of the Florida and federal RICO statutes. These enterprises allegedly violated Ecuador's regulatory scheme by illegally selling tobacco products on the Ecuadorian black market. To further these unlawful enterprises, Ecuador alleges Defendants committed numerous acts, including mail and wire fraud. Moreover, Defendants allegedly falsified shipping records, stamps, and labels on packages that Ecuadorian officials inspected.

While Ecuador claims it pursued all smuggling activity with reasonable diligence, it only recently discovered sufficient evidence to bring claims for relief. The delay in discovering the smuggling operations was allegedly caused

by Defendants' false and deceptive representations. Ecuador pleads that Defendants, individually and collectively, attempted to prevent detection of their smuggling operation by creating shield companies, circumventing labeling regulations, implicating organized crime as the source of cigarette smuggling, and issuing public statements disavowing responsibility for the smuggling.

1. The RJR Defendants' Alleged Smuggling Operations

Particularly, Ecuador alleges that Defendant RJR International set up a subsidiary to remove itself one step from the smugglers. RJR International's Special Markets Division, operating out of Winston-Salem, North Carolina, allegedly oversaw and directed a scheme to avoid taxes from about 1987 until 1992. By the end of 1992, Ecuador alleges that the RJR Defendants made a high-level decision to establish a subsidiary, Defendant Northern Brands International (NBI), to encumber Ecuador's ability to discover the RJR companies' involvement in the smuggling.

Defendant Richard Larocca, while an employee at RJR International, allegedly orchestrated a network to smuggle RJR's tobacco products. Ecuador claims that Larocca and the RJR Defendants, through their use of distributors, ship handlers, and smugglers, established the routes and mechanisms by which cigarettes were smuggled. According to the Ecuadorian government, Larocca provided the RJR defendants with information regarding efficient smuggling techniques, potential markets for smuggled products, and potential smugglers to effectuate the scheme.

2. The Philip Morris Companies' Alleged Smuggling Operations

The amended complaint indicates that Philip Morris engaged in a labrynthine distribution structure to conceal sales and evade taxes. Ecuador alleges that beginning in 1997 the Philip Morris Defendants re-routed cigarette sales through Belgium and Panama. This restructuring allegedly allowed the company to conceal these activities from customs officials.

Ecuador maintains that no documentation was kept in a further effort to conceal the illicit activities. And, to maximize the amount the cigarettes available to be channeled into the smuggling pipeline, the Philip Morris Defendants allegedly supplemented their circuitous distribution scheme with a financing scheme. The financing scheme purportedly allowed the distributors to keep more tobacco products at bay and ready for smuggling than they would otherwise be able to maintain under a cash on delivery system. This plot was allegedly profitable because it allowed the Philip Morris Defendants to maximize the volume of tobacco products for smuggling operations.

In the amended complaint, the Republic of Ecuador references several meetings the Philip Morris Defendants held and plans they developed to conceal as well as enhance smuggling operations. Some of these plans and policies were express, others tacit. All purportedly allowed the Philip Morris Defendants to receive illicit monies and evade valid taxes.

3. Other Defendants Alleged Smuggling Operations

Ecuador asserts that other Defendants engaged in a similar process to engage in and conceal smuggling operations. Allegedly, more than 11,000 pages of documents from Defendants British American Tobacco and Brown & Williamson reveal that the Defendants, collectively and individually, encouraged tax evasion and cigarette smuggling in Ecuador. Defendants, acting in concert, allegedly misrepresented to Plaintiff Ecuador that the "black market" for cigarettes existed because of high taxes. Instead, Ecuador asserts that Defendants' actions to smuggle products caused the Ecuadorian "black market" to emerge. Moreover, Ecuador asserts that the active smuggling operations coupled with their concealment of their complicit behavior caused Ecuador to lose tax revenues from the sale of tobacco.

C. Ecuador's Claims

Ecuador brings state law common law causes of action for fraud, intentional misrepresentation, conspiracy and concert of action. To relieve these claims, Ecuador asserts that it is entitled to money damages for lost duties and taxes. Additionally, Ecuador asserts causes of action under the Florida RICO statute, § 895.02, *et seq.* and its federal counterpart 18 U.S.C. § 1961, *et seq.* for money damages to compensate for lost duties and taxes, law enforcement costs, treble damages, and injunctive relief.

After removing this action, Defendants moved to dismiss on several grounds. They argue that the revenue rule requires this Court to abstain from adjudicating Ecuador's claims. Because this Court finds this issue is

dispositive of Ecuador's claims, the Court need not reach the other grounds for dismissal.

II. LEGAL STANDARD

A court will not grant a motion to dismiss unless it appears beyond doubt that the plaintiff can prove no facts that would entitle the plaintiff to relief. *See Conley v. Gibson,* 355 U.S. 41 (1957). The Federal Rules of Civil Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim." *Id.* at 47. All that is required is "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well-pleaded facts as true. *See Scheuer v. Rhodes,* 416 U.S. 232 (1974); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.,* 795 F.2d 948 (11th Cir. 1986). The standard on a 12(b)(6) motion is not whether the plaintiff will ultimately prevail in his theories, but whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove allegations. *See Jackam v. Hosp. Corp. of Am. Mideast, Ltd.,* 800 F.2d 1577, 1579 (11th Cir. 1986).

III. LEGAL ANALYSIS

"But I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments?" *James Madison,* 1 Annals of Cong. 500 (Joseph Gales ed., 1789).

1. The Revenue Rule

Separation of powers has led to the creation of judicial doctrines that render certain issues non-justiciable. The act of state doctrine, principles of international comity, and the political question doctrine are among them. The revenue rule is another. This age-old common law doctrine provides that courts of one sovereign will not enforce unadjudicated tax claims of other sovereigns. *See Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001); *The European Cmty. v. Japan Tobacco, Inc.*, No. 02-CV-00164 (NGG), 2002 WL 234241, at *3 (E.D.N.Y. Feb. 19, 2002) ("*European Cmty. II*"). The issue, here, is whether this rule precludes this Court from adjudicating Ecuador's civil RICO and common law claims. It does.

Though the complaint is pled under federal and state law causes of action, the substance of the claim is to enforce Ecuadorian tax laws. This is precisely the type of meddling in foreign affairs the revenue rule prohibits. *See Attorney General of Canada,* 268 F.3d at 108 (holding that revenue rule precluded a civil RICO claim brought by Canada to enforce its taxing scheme on several American tobacco companies); *European Cmty. II,* 2002 WL 234241, at *3, *10 (holding revenue rule barred civil RICO and common law claims).

A. The Revenue Rule's History and Continued Viability

The revenue rule's origins date to the eighteenth-century English court decisions seeking to protect British trade from the oppressiveness of foreign customs. Formulated in an era of acrimonious commercial competition, the

rule was devised to protect a transaction that violated Portugal's export duties. *See Boucher v. Lawson,* 95 Eng. Rep. 53 (K.B. 1734) (Lord Hardwicke, C.J.).

The revenue rule also has a longstanding history in the United States. Courts have commented on the rule's importance throughout our history. Judge Learned Hand stated more than seventy years ago:

> Revenue laws . . . affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring), *aff'd,* 281 U.S. 18 (1930) (declining to express an opinion on whether a federal court in one state would enforce the revenue laws of another state).[1]

Courts have repeatedly held that a federal court need not give effect to the revenue laws of foreign countries. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 448 (1964) (White, J. dissenting on other grounds) ("Our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign state"); *Her Majesty the Queen in Right of the Province of British*

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[1] The Supreme Court later held that states' tax judgments were entitled to full faith and credit in a court of another state. *See Milwaukee County v. M.E. White Co.,* 296 U.S. 268 (1935) (stating that courts of one state do not have to entertain a suit to recover taxes levied under a foreign state's statute and holding that they must give full faith and credit to *judgments* for taxes entered in another state).

Columbia v. Gilbertson, 597 F.2d 1161, 1165 (9th Cir. 1979) ("[I]f the court below was compelled to recognize the tax judgment from a foreign nation, it would have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do."); *United States v. First Nat'l City Bank,* 321 F.2d 14, 23-24 (2d Cir. 1963) ("[i]t has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim."). As recently as last year, the Second Circuit recognized the viability of the revenue rule and applied that rule to bar Canada's RICO claim to recoup lost revenue due to alleged smuggling of tobacco products into its territory. *See Attorney General of Canada,* 268 F.3d at 106.

This Court is persuaded that separation of powers mandates the continued enforcement of the revenue rule. The rationale supporting the revenue rule's viability here is the Constitutional designation of authority to the Executive and Legislative branches to administer foreign relations. *See* U.S. Const. art.I, art. II.[2] Extraterritorial tax enforcement directly implicates relations between the United States and other sovereign nations. *See Attorney General of Canada,* 268 F.3d at 114. As the Second Circuit stated:

> When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues

[2] The President has the power, "with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, § 2. Congress regulates "commerce with foreign nations." *Id.*, art. I, § 8, cl. 2.

> and disputes of foreign relations policy that are assigned to – and better handled by – the political branches of government.

Id.; *see also INS v. Aguirre-Aguirre,* 526 U.S. 415, 425 (1999) (stating that courts are not responsible for political functions affecting foreign relations); *Sun Oil Co. v. Wortman,* 486 U.S. 717, 740 n.3 (1988) (Brennan, J., concurring) (recognizing continued validity of rule barring adjudication of a foreign tax suit); *United States v. Boots,* 80 F.3d 580, 587 (1st Cir. 1996) (applying the revenue rule to reverse conviction for conspiracy to violate Canadian tax laws).

B. Tax Treaties and the Revenue Rule

The existence of tax treaties is telling. Congress and the Executive have entered several tax treaties on behalf of the United States, but not with Ecuador.[3] U.S. tax treaties typically provide for information exchange and limited collection assistance but not extraterritorial enforcement of tax judgments or claims in U.S. courts. *See Attorney General of Canada,* 268 F.3d at 119. In the absence of a treaty with Ecuador abrogating the revenue rule, this Court cannot disregard it. *See First Nat'l Bank,* 321 F.2d at 21. As the Second Circuit stated:

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[3] There are only five tax treaties in existence where the United States has agreed to provide general assistance in the collection of tax judgments. Soon after the United States entered these treaties, it sought to curtail the availability of courts to render foreign tax collection assistance. *See Attorney General of Canada,* 268 F.3d at 116.

> Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of intergovernmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner.

Id.

Ecuador clings to the argument that the *Attorney General of Canada* decision, where the Second Circuit rejected an almost identical suit by Canada, is limited to its facts because there exists a broad tax treaty between the United States and Canada that occupied the field in that case. The lack of a tax treaty with Ecuador, however, does not lead to the affirmative conclusion that the revenue rule does not apply. In fact, the lack of a treaty is all the more reason why this Court must enforce the revenue rule. Why would Ecuador negotiate a tax treaty with the Executive to recover lost taxes if it could pursue RICO's treble damages in court? An adjudication of Ecuador's claims would eliminate Ecuador's incentive to negotiate a tax treaty with the Executive. Moreover, such an adjudication would have a direct effect on the bargaining position of the United States vis-á-vis Ecuador in such a negotiation. Possibly, the Executive's ability to secure reciprocity of U.S. tax claims in Ecuador could be undermined if the Judiciary did not adhere to the principal of noninterference. *See Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332, 340 (1st Cir. 2000). As the First Circuit stated:

> Care should be taken not to impinge on the Executive's treaty-making prerogatives or to assume

> that courts have the institutional competence to perform functions assigned elsewhere in the Constitution. . . . The Executive often requires, before extending rights to foreign nations, that there be agreements providing for reciprocal protection of American interests.

Id. (citations omitted).

Accordingly, this Court disagrees with Ecuador. The lack of a treaty, in this case, does not mean the revenue rule should not be enforced. In fact, the Court finds the opposite to be true and declines to adjudicate Ecuador's claims for injunctive and monetary relief.[4] Had Ecuador entered a treaty with the United States requiring U.S. courts to adjudicate Ecuador's tax claims, this Court would entertain such a suit. *See Attorney General of Canada,* 268 F.3d at 137 (Calabresi, J. dissenting) ("the moment treaties or laws are enacted that provide for the enforcement of certain foreign judgments, the situation changes. United States courts can thereafter enforce these judgments and must do so."). There is no such directive here.

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[4] In *Attorney General of Canada,* the Second Circuit dismissed the claims for equitable [sic] on different grounds, stating that there is no cause of action for injunctive relief under RICO. *See Attorney General of Canada,* 268 F.3d at 108. The type of injunctive relief sought in this case includes disgorgement of profits made from alleged tax evasion and monitoring for compliance with foreign tax laws. This Court does not find that the equitable relief sought differs substantively from the claims for monetary relief – both require this Court to provide relief for lost taxes, whether it be the actual taxes lost or future taxes evaded.

C. Does Form Matter?

Ecuador urges this Court to elevate form over substance and draw a formal distinction between an action based entirely on Ecuadorian tax law and one that pleads violations of Ecuadorian law, but asserts a cause of action under United States and Florida law. Such a distinction is unwarranted. As the Second Circuit stated in rejecting an identical argument: "What matters is not the form of the action, but the substance of the claim." *Attorney General of Canada,* 268 F.3d at 130.

Judge Calabresi, in dissent of the *Attorney General of Canada* majority, states "though foreign tax laws cannot be enforced directly, when American law renders an activity – including the violations of foreign tax laws – an American tort or crime, the issues of . . . our foreign policy . . . disappear." *See Attorney General of Canada,* 268 F.3d at 137. This Court respectfully disagrees. This is not an action brought solely under United States and Florida law, but rather is a claim using United States and Florida law to enforce an unadjudicated Ecuadorian tax claim. Thus, the foreign policy and separation of powers issues do not "disappear." *See Attorney General of Canada,* 268 F.3d at 131. Ecuador's amended complaint directly states that it seeks to recoup actual damages in the amount of lost revenue. If this Court were to require Defendants to provide Ecuador with relief for lost revenue, that would be an order requiring payment of unpaid taxes, striking at the heart of the revenue rule's purpose. *See Attorney General of Canada,* 268 F.3d at 131.

In its prayer for relief, Ecuador also indicates it seeks to recover the law enforcement costs of investigating and

prosecuting this suit. In rejecting an identical claim for law enforcement costs, the Second Circuit stated:

> In effect, Canada is requesting that defendants pay the salary of the tax enforcers; such police costs are thus derivative of the taxes Canada sought to enforce. We do not believe that the mechanism for the enforcement of a tax law can be so easily separated from the tax law itself. It would certainly be anomalous for the Court to permit the collection of the law enforcement costs while holding that the object of those law enforcement efforts was uncollectable. Particularly in light of the separation of powers and foreign relations concerns discussed . . . , we must decline to allow Canada to indirectly enforce its revenue laws simply by pleading tort damages based on the costs of enforcing those laws.

Attorney General of Canada, 268 F.3d at 132. This Court agrees. The claim for law enforcement costs to enforce Ecuador's tax laws is derivative of the claim for lost revenue. Accordingly, this Court abstains from adjudicating such a claim under the revenue rule.

In a further attempt to elevate form over substance, Ecuador argues the revenue rule is irrelevant as it is not bringing a cause of action under its own tax laws but under the RICO statutes, to which this Court must give effect. Congress, however, has not abrogated the revenue rule in enacting the RICO statute and the Florida legislature has no authority under the supremacy clause to eradicate a federal common law rule. *See* U.S. Const. art. VI (supremacy clause). Principles of statutory construction require this Court to construe the federal RICO statute as preserving the revenue rule absent clear evidence of Congressional intent to abrogate it. *See Astoria Fed. Sav.*

& Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991). Because the federal RICO statute does not speak directly to the effectiveness of the revenue rule, this Court must give it effect. *See Neder v. United States,* 527 U.S. 1, 21-23 (1999) (interpreting federal RICO statutes to include common law limitations in absence of specific reference to common law doctrine); *Attorney General of Canada,* 268 F.3d at 127-28 (interpreting RICO statute to include revenue rule's limitation and showing Congress' awareness of revenue rule). Accordingly, this Court must read RICO in conjunction with the revenue rule. In doing so, this Court does not read the federal RICO statute to provide a cause of action for a violation of a foreign *tax* law, while it may make violations of other types of foreign laws actionable.[5]

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[5] After the Second Circuit handed down the *Attorney General of Canada* decision on October 16, 2001, Congress contemplated and rejected a provision in the USA Patriot Act that would have codified the revenue rule. That Congress rejected that provision, however, does not lead to the affirmative conclusion that the revenue rule is not binding, especially since Congress rejected that provision after the Second Circuit found the rule viable and applied it in *Attorney General of Canada. See European Cmty. II,* 2002 WL 234241, at *6-9 (discussing at length and holding that Congress' rejection of provision codifying revenue rule did not demonstrate that Congress affirmatively acted to abrogate the rule); *see also* William Eskridge, Jr., *Interpreting Legislative Inaction,* 87 Mich. L. Rev. 67 (1988) (stating that negative legislation action only effects positive law where the lack of action may be construed as an affirmative legislative decision not to disturb prior law or practice). Even if Ecuador were to have argued that this Court should construe Congress' rejection of the provision as an abrogation, this Court would not construe it as such because to do so would disturb the status quo set forth in *Attorney General of Canada.* In light of this Court's discussion on the rule's viability and applicability here to protect our separation of powers, this Court will not construe Congress'

(Continued on following page)

At bottom, the substance of Ecuador's claims, like Canada's claims, is to directly and indirectly enforce its tax laws and require this U.S. Court to adjudicate a foreign tax claim. Such an adjudication, even if fashioned under civil RICO and common law causes of action, implicates separation of powers. By applying the revenue rule, this Court maintains the integrity of that Constitutional doctrine and allows the political branches to set the parameters of the United States' dealings with Ecuador. Ecuador's proper recourse, therefore, is not in the courts but rather in negotiating a tax treaty with our political branches or adjudicating and enforcing these claims within its own territory.

C. Civil vs. Criminal RICO – Is there a Distinction?

Ecuador urges this Court to follow two criminal RICO cases from the Second Circuit, where it held abstention under the revenue rule improper. *See generally United States v. Trapilo,* 130 F.3d 547 (2d Cir. 1997); *United States v. Pierce,* 224 F.3d 158 (2d Cir. 2000). In *Trapilo* and *Pierce,* the Second Circuit held the revenue rule did not bar adjudication of a criminal RICO prosecution. *See Trapilo,* 130 F.3d at 552 (holding that revenue rule did not bar prosecution of a money laundering scheme to defraud the Canadian government of tax revenue); *Pierce,* 224 F.3d at 167-68 (reversing convictions of two *Trapilo* defendants due to U.S. government's failure to establish applicability

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rejection of the provision to mean that the rule is not applicable in a RICO suit to recover taxes incurred under Ecuadorian law.

of Canada's tax laws that the defendants allegedly circumvented).

Implicit in the Second Circuit's holdings is that criminal cases are different – lacking the separation of powers issues presented here. In criminal RICO cases, the United States Attorney makes the decision to bring the case. The United States is the plaintiff and the foreign relations goals and policies of the United States can therefore be accommodated in that litigation. Here, there is no such provision for accommodating the interests of the United States. In the civil RICO context, the foreign sovereign plaintiff is seeking to further its own agenda, which may or may not be consistent with that of the United States. *See Attorney General of Canada,* 268 F.3d at 123. Ecuador's interests to eradicate these alleged smuggling operations and recoup lost revenues may or may not be consistent with U.S. foreign policy. But, that is not for this Court to decide. Only the political branches have that authority.[6]

D. Ecuador's Further Critique of the Revenue Rule

Ecuador relies on *European Cmty. v. RJR Nabisco, Inc.,* 150 F. Supp. 2d 456 (E.D.N.Y. 2001) (*"European Cmty. I"*) to critique the revenue rule. In dicta, Judge Garaufis criticizes the revenue rule as obsolete and incongruous with other judicial policies. *See id.* at 487. After

[6] Though the Court is persuaded that there is a distinction between civil and criminal RICO, the Court only decides here the applicability of the revenue rule in the civil RICO context.

Attorney General of Canada, Judge Garaufis reconsidered this issue in *European Cmty. II,* where he followed the Second Circuit's decision and applied the revenue rule to dismiss the European Community's lawsuit. *See id.,* 2002 WL 234241, at *3-10.

The academic literature has also largely criticized the revenue rule as having little application when the foreign sovereign is the plaintiff in a case. *See* William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule,* 22 Hous. J. Int'l L. 265 (2000) (stating that Justice Hand's rationale that the review of foreign tax laws might cause the foreign nation "embarrassment" is outdated rationale when foreign government is plaintiff).[7] To reiterate, this Court is less concerned about "embarrassing" Ecuador and is more concerned with encroaching on Legislative and Executive functions. Even Judge Garaufis conceded in his initial European Community opinion that separation of powers remains a legitimate basis for invoking the rule. *See European Cmty. I,* 150 F. Supp. 2d at 477 ("abstention under the revenue rule is never warranted in the absence of genuine separation of powers concerns."); *see also*

[7] Other commentators have wondered why courts do not employ *forum non conveniens* doctrine when the need arises to interpret a foreign tax law rather than invoking the revenue rule. *See* Thomas B. Stoel, Jr., *The Enforcement of Foreign Non-criminal Penal & Revenue Judgments in England & the United States,* 16 Int'l & Comp. L.Q. 663, 671 (1967). While this may be a valid argument in a case where a Defendant can show there is an adequate alternative forum and the private and public factors dictate dismissal in favor of that forum, it is not a valid criticism here. The Court notes the parties' failure to address this issue is indicative that the analysis is inapplicable and Ecuador is not an adequate alternative forum.

European Cmty. II, 2002 WL 234241, at *4 ("the concerns underlying the current version of the revenue rule are satisfied where the proper coordinate branch adequately confers its blessings on jurisdiction.").

Ecuador further criticizes the revenue rule as incongruous with the act of state doctrine. This Court does not find such incongruity. The act of state doctrine precludes U.S. courts from questioning the acts of a foreign sovereign within its own territory. *See Banco Nacional de Cuba,* 376 U.S. at 423-24 (holding that U.S. court was without jurisdiction to adjudicate a contract dispute regarding the Cuban government's expropriation of defendant's sugar). The doctrine traditionally applies when the relief sought or the defense interposed would require a court to declare invalid the official act of a foreign sovereign. *See W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l.,* 493 U.S. 400, 406 (1990). The Supreme Court noted the act of state doctrine "arises out of basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Banco Nacional de Cuba,* 376 U.S. at 423. As such, both the act of state doctrine and the revenue rule function to eradicate U.S. courts' involvement in foreign affairs, a function properly left to the political branches of government. *See Attorney General of Canada,* 268 F.3d at 125-26 (reconciling the act of state doctrine with the revenue rule in this fashion). Ecuador asserts that the act of state doctrine requires courts to deem valid the acts of a foreign sovereign taken within its jurisdiction. *See W.S. Kirkpatrick & Co.,* 493 U.S. at 406-09. While this is a correct statement of the law, Ecuador misconstrues this statement to mean that U.S.

courts must take affirmative steps to enforce Ecuadorian tax obligations. This the Court cannot do.

In addition, Ecuador asserts that to the extent the revenue rule is viable, it is discretionary. *See European Cmty.*, 150 F. Supp. 2d at 476. This Court has recognized that the revenue rule is a rule of abstention, where the Court though possessing jurisdiction may decline to exercise it. Here, the Court reiterates that it declines to exercise jurisdiction because to do so would interfere with the functions of our political branches of government.

Accordingly, this Court declines to extend jurisdiction and adjudicate Ecuador's claims for relief, as such an act would mar separation of powers. This Court does not derive "from the Constitution greater powers than another, in marking out the limits of the powers of the several departments." *James Madison,* 1 Annals. of Cong. 500 (Joseph Gales ed., 1789).

IV. CONCLUSION

It is,

ADJUDGED that Defendant's Motion to Dismiss is GRANTED. The entire complaint is dismissed with prejudice.

DONE AND ORDERED in Chambers at Miami, Florida, this 26 day of February, 2002.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES
DISTRICT JUDGE

copies provided:

[Names Omitted In Printing]

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 95 – RACKETEERING

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

> **(A)(i)** with the intent to promote the carrying on of specified unlawful activity; or
>
> **(ii)** with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> **(B)** knowing that the transaction is designed in whole or in part –
>
> > **(i)** to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> >
> > **(ii)** to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place

in the United States from or through a place outside the United States –

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent –

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of –

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section –

* * *

(7) the term "specified unlawful activity" means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act

which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving –

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978);

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving –

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to

submit the case for prosecution, if the offender were found within the territory of the United States;

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TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 96 – RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344

(relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer

programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and

charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

UNITED STATES CODE
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PART I – CRIMES
CHAPTER 96 – RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is

engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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CHAPTER 96 – RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 63 – MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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PART I – CRIMES
CHAPTER 63 – MAIL FRAUD

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

UNITED STATES CODE
TITLE 31. MONEY AND FINANCE
SUBTITLE I – GENERAL
CHAPTER 3 – DEPARTMENT OF THE TREASURY

§ 310. Financial Crimes Enforcement Network

(a) In general. – The Financial Crimes Enforcement Network established by order of the Secretary of the Treasury (Treasury Order Numbered 105-08, in this section referred to as "FinCEN") on April 25, 1990, shall be a bureau in the Department of the Treasury.

(b) Director. –

(1) Appointment. – The head of FinCEN shall be the Director, who shall be

appointed by the Secretary of the Treasury.

(2) Duties and powers. – The duties and powers of the Director are as follows:

* * *

(F) Assist Federal, State, local, and foreign law enforcement and regulatory authorities in combatting the use of informal, nonbank networks and payment and barter system mechanisms that permit the transfer of funds or the equivalent of funds without records and without compliance with criminal and tax laws.

Supreme Court, U.S.
FILED
DEC 8 - 2003

No. 03-686

IN THE

Supreme Court of the United States

THE REPUBLIC OF HONDURAS, THE REPUBLIC OF ECUADOR, and THE REPUBLIC OF BELIZE,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the revenue rule, which has long barred one country from directly or indirectly enforcing its tax laws in the courts of another country, preclude Ecuador, Honduras, and Belize from using the U.S. courts and the RICO statute to recover three times the lost taxes and related costs allegedly resulting from cigarette smuggling?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Altria Group, Inc. f/k/a Philip Morris Companies Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent Philip Morris USA Inc. f/k/a Philip Morris Incorporated has the following parent corporation:

Altria Group, Inc.

No other publicly held company owns 10% or more of its stock.

Respondents R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., and Northern Brands International, Inc. have the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

No other publicly held company owns 10% or more of their stock.

Respondent Brown & Williamson Tobacco Corporation has the following parent corporations:

BATUS Tobacco Services, Inc.

British American Tobacco p.l.c.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent BATUS Holdings, Inc. has the following parent corporations:

Louisville Securities Ltd.

British American Tobacco p.l.c.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATUS Holdings, Inc.'s stock.

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INTRODUCTION

The U.S. Court of Appeals for the Eleventh Circuit invoked the longstanding revenue rule to bar attempts by Honduras, Ecuador, and Belize (the "Republics") to collect foreign taxes via civil RICO suits in U.S. courts. That ruling is consistent with more than 200 years of case law from around the world, and with every state and federal court decision in this country. Not only is there no conflict in the Circuits on the application of the revenue rule to these facts, but this Court denied certiorari just last term in a virtually identical suit by Canada, whose claims were rejected by the U.S. Court of Appeals for the Second Circuit on the same grounds applied by the Court of Appeals here. *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002).

In *Attorney General of Canada*, the Solicitor General argued that certiorari should not be granted because the Second Circuit correctly held that the revenue rule serves important separation of powers interests: the rule's prohibition on the use of U.S. courts to collect foreign taxes provides the baseline from which the Executive has negotiated treaties with certain allies providing limited, reciprocal tax collection assistance, while withholding such privileges from other nations. Petitioners claim that the position the United States took in opposing certiorari in *Attorney General of Canada* "may have been overtaken by events." Petition for a Writ of Certiorari ("Pet.") at 9-10 n.1. But the only relevant event since this Court denied Canada's petition is that the Eleventh Circuit has joined the Second. Now, two circuit courts have ruled that foreign governments may not circumvent the treaty process, and eschew their own courts, by recasting foreign tax claims as civil RICO suits in

an effort to collect three times their allegedly lost tax revenues and related expenses. Such complete agreement among the Circuits provides no basis for this Court to alter its decision from just last term to deny certiorari on this very issue.

The Republics try to conjure up a split where none exists by pointing to a case that allowed a criminal prosecution by the U.S. government to proceed in the face of a revenue rule challenge. Pet. at 2-3 (citing *United States v. Pasquantino*, 336 F.3d 321 (4th Cir.) (en banc), *pet. for cert. filed*, No. 03-725 (Nov. 14, 2003)). But, as the Court of Appeals in *Pasquantino* was careful to acknowledge, a criminal prosecution by the U.S. government does not implicate any of the concerns that have led courts uniformly to reject suits by foreign governments to enforce their tax laws. The decision to bring charges was made by the Executive branch, which could assess any foreign policy implications; the prosecution did not enforce any foreign revenue laws; and the result of the prosecution was not an award of damages to a foreign government for lost tax revenues, precisely what the revenue rule forbids. *See* 336 F.3d at 331.

Here, by contrast, the revenue rule is directly implicated because "[t]he Republics' claims fundamentally deal with the adjudication of foreign tax claims," and all of their claims "involve schemes to avoid paying taxes and seek to collect these unpaid taxes." *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1257 (11th Cir. 2003), Appendix to Petition for Writ of Certiorari ("Pet. App.") at 8-9. As the Eleventh Circuit recognized below, and as the Second Circuit recognized in *Canada*, such claims are forbidden by the revenue rule. There is no authority to the contrary—here or anywhere in the world—and no reason for this Court to revisit this long-settled question.

STATEMENT OF THE CASE

On June 5, 2000, Ecuador filed its original complaint, seeking to recover lost tax revenues and related costs resulting from an alleged scheme to smuggle cigarettes into the country. R-1.[1] Although the complaint alleged a widespread conspiracy targeting Ecuador, the only specific allegations detailed a scheme to smuggle cigarettes into *Canada*—because Ecuador had simply copied large portions of its complaint from the one in the *Attorney General of Canada* case, which was dismissed by the Second Circuit in a ruling this Court declined to review last term. *Id.* at 22-26; *see also* R-15 at 19 n.9. In subsequent months, Ecuador's counsel filed identical complaints on behalf of Honduras and Belize, changed only by substituting "Honduras" or "Belize" for "Ecuador."

Plaintiffs then filed amended complaints, again virtually identical, alleging that they have incurred millions or billions of dollars of damages from "the loss of customs duties, fees, taxes, money and property" by reason of alleged schemes by defendants to smuggle contraband cigarettes. R-1 (II) at 8. According to plaintiffs, these "schemes supplant the sales of lawfully sold cigarettes on which levies, duty, money and taxes would have been paid." *Id.*

The district court dismissed the amended complaints based on the revenue rule, an "age-old common law doctrine

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1. Although petitioners did not submit any portion of the record below to this Court, they have cited liberally and inaccurately to the "record" ("R"). For example, citing their amended complaints, petitioners assert that Miami bank accounts of the RJR and Philip Morris defendants were frozen by drug enforcement agencies. *See* Pet. at 4. But these patently false allegations are nowhere found in the amended complaints.

provid[ing] that courts of one sovereign will not enforce unadjudicated tax claims of other sovereigns." Pet. App. at 28. Because plaintiffs' civil RICO suits were actions to enforce foreign tax laws and to recover foreign tax revenues, the court concluded that the suits presented "precisely the type of meddling in foreign affairs the revenue rule prohibits." *Id.* Given the impact on foreign relations, the court concluded that "separation of powers mandates the continued enforcement of the rule" because authority over foreign affairs is delegated to the political branches in our constitutional scheme, and "'Congress has seen fit to handle this problem in another manner.'" *Id.* at 32 (quoting *United States v. First Nat'l City Bank*, 321 F.2d 14, 21 (2d Cir. 1963)). In particular, the court found that international tax collection has only been allowed in the U.S. in very limited circumstances, and when allowed at all, has only occurred through the treaty process—permitting the U.S. to secure reciprocal rights. *Id.* at 31-32. And given Congress's decision to address foreign tax collection through the treaty process, and the revenue rule's long-standing pedigree in U.S. and international law, the court rejected the Republics' suggestion that Congress abrogated the rule through enactment of a statute of general application like RICO. *Id.*

The Eleventh Circuit affirmed, concluding that plaintiffs' claims "fundamentally deal with the adjudication of foreign tax claims" and seek the collection of "unpaid taxes." *Id.* at 7, 8. The Court of Appeals recognized that the Executive and Congress "have expressed a 'continuing policy preference against enforcing foreign tax laws . . . ,'" and that they "undisputedly have not entered into any type of tax treaty with any of the Republics that would allow the Republics to enforce their tax claims underlying this suit in this country."

Id. at 12 (quoting *Attorney General of Canada*, 268 F.3d at 118). Thus, the Court of Appeals held that it could not consider plaintiffs' claims unless the political branches took action in favor of allowing unadjudicated foreign tax claims in domestic courts, *id.*, and it rejected the Republics' argument that RICO had this effect because "it misapprehends basic rules of statutory interpretation" that Congress legislates against the backdrop of the common law. *Id.* at 13. In this regard, the Court of Appeals found that "[l]ittle question exists that the revenue rule is a 'long-established and familiar principle'" of the common law, and that the language of RICO and the statutory purpose offer no hint that Congress intended to abrogate the rule. *Id.* at 14 (quoting *Attorney General of Canada*, 268 F.3d at 111-12).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court, any Court of Appeals, or any court anywhere in the world for that matter. Two Courts of Appeals have now considered the precise question presented here, and both have reached the identical conclusion: a foreign government may not recast a foreign tax claim as a RICO violation in an effort to collect three times its lost tax revenues and related expenses as a result of an alleged smuggling scheme. In rejecting such claims, both Courts of Appeals invoked the revenue rule, both agreed that the rule bars a foreign government from seeking to enforce, directly or indirectly, a claim for foreign taxes, and both agreed that application of the rule in the U.S. is grounded in respect for sovereignty and separation of powers.

I. There is No Circuit Split on The Question Presented.

A. The Revenue Rule Bars Direct and Indirect Attempts to Enforce Foreign Tax Claims.

It "has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim." *United States v. First Nat'l City Bank*, 321 F.2d 14, 23-24 (2d Cir. 1963); *see also Honduras*, Pet. App. at 6 ("The revenue rule is a long-standing common law rule that prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign"); *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1166 (9th Cir. 1979) ("The revenue rule has been with us for centuries and has become firmly embedded in the law"); 1 DICEY & MORRIS, The Conflict of Laws 97 (13th ed. 2000) ("there is a well-established and almost universal principle that the courts of one country will not enforce the penal or revenue laws of another country"). The rule has been universally invoked for more than two centuries from the sweeping pronouncement of Lord Mansfield in *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775), that "no country ever takes notice of the revenue rules of another," to the dismissal four months ago of the suits by the Republics. Indeed, petitioners do not cite a single case in which a foreign government has been allowed to enforce its tax laws directly or indirectly in the courts of another country, and no such case will be found.[2]

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2. This Court has acknowledged the longstanding "principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries or sister states." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413 (1964). Likewise, the dissent in *Sabbatino* recognized that "our courts

(Cont'd)

The authorities are unanimous that the revenue rule precludes both direct *and indirect* attempts to collect foreign taxes, and the reason is straightforward: "If [the rule] were otherwise, litigants could freely avoid the impact of the revenue rule by bringing tax claims under the guise of non-tax-related causes of action." *Honduras*, Pet. App. at 7; *see also Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 239 N.Y.S.2d 872, 875 (1963) (rejecting fraud claim for evasion of currency controls because Brazil "is seeking, by use of an action for conspiracy to defraud, to enforce what is clearly a revenue law"); *United States v. Harden*, [1963] S.C.R. 366, 371 (Canadian Supreme Court rejects breach of contract claim settling tax dispute in light of "the special principle that foreign States cannot directly or indirectly enforce their tax claims"); *QRS 1 APS v. Frandsen*, [1999] 3 All E.R. 289, 291 (C.A.) ("It is a fundamental principle of English law that our courts will not directly or indirectly enforce the penal, revenue or other public laws of another country. On the English authorities it is clear that the present action falls foul of that rule: in substance it involves the indirect enforcement of Denmark's revenue law." (internal citation omitted)).

(Cont'd)

customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign." *Id.* at 448 (White, J., dissenting on other grounds). Both the majority and dissenting opinions reiterate what had long ago been accepted by the Court. *See, e.g., Huntington v. Attrill*, 146 U.S. 657, 671 (1892) (observing that courts cannot entertain "suits . . . for the recovery of pecuniary penalties for any violation of statutes for the protection of [another country's] revenue") (quoting *State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888)).

As recognized below and by the Second Circuit in *Attorney General of Canada*, because international tax collection raises sensitive issues of foreign relations, it has always been treated as a matter governed entirely by treaty—a subject committed by the U.S. Constitution to the political branches of government. *First Nat'l City Bank*, 321 F.2d at 24 ("The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner."); *Attorney General of Canada*, 268 F.3d at 119 ("the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to extraterritorial enforcement of a foreign sovereign's tax laws"). For example, the Republics suggest that they use "import taxes" to keep imported cigarettes from being "competitive" with domestic products, Pet. at 1-2, a goal that may be inconsistent with our government's trade policies. Courts lack institutional competence to determine whether enforcement of foreign tax claims would serve the interests of the U.S.; they can provide no guarantee that the U.S. will have reciprocal rights to enforce similar claims abroad; and judicial enforcement of such claims would intrude on the Executive Branch's treaty-making authority and the policy judgments reflected in specific U.S. treaties. *See Attorney General of Canada*, 268 F.3d at 113 ("Concern about institutional role and competence provides particularly compelling support for the application of the revenue rule in this particular case."). The revenue rule "instructs the courts to leave this area alone, so that the legislative and executive branches may exercise their authority and bargaining power to deal with such issues." *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996); *see also Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 340 (1st Cir. 2000) ("Care should

be taken not to impinge on the Executive's treaty-making prerogatives or to assume that courts have the institutional competence to perform functions assigned elsewhere by the Constitution.").

B. There is no Basis for Revisiting Application of the Revenue Rule in this Case.

Faced with the uniform rejection of claims like theirs, and the long-standing principles invoked by the courts that have refused to adjudicate them, the Republics struggle to fashion an argument that would warrant the involvement of this Court. They settle on a flawed premise and a false conflict: an overly narrow definition of the revenue rule that lacks any historical basis and a purported conflict between the decision below and a case not brought by a foreign government asserting a civil claim for lost tax revenues, but by the Executive branch seeking to prosecute a crime. There is nothing to either argument.

Resorting to an argument they waived by not raising it before the Court of Appeals, the Republics claim that the "undisputed" purpose of the revenue rule is simply to prevent enforcement of foreign tax "judgments," and it was "never intended" to preclude suits against American corporations for evasion of foreign taxes if such activity violates "U.S. statutory law." Pet. at 3, 6. And even if the rule "would extend to such actions," the Republics contend, the Court of Appeals in *Pasquantino* supposedly recognized that "its applicability has never been established with such force and clarity" to supplant the plain language of the RICO statute that "creates the Plaintiffs' causes of action," *id.*, with the result that there is a split among the Courts of Appeals on the issue before the Court.

The problem with these arguments, other than waiver, is that they are simply not the law. As the Court of Appeals ruled below, as the Second Circuit ruled in *Attorney General of Canada*, and as the authorities above confirm, the revenue rule is a well-established common law principle that has long barred any attempt by foreign governments to use U.S. courts to collect foreign taxes. Pet. App. at 7; 268 F.3d at 130-31. Thus, the Republics have their statutory construction precisely backwards: the question is not whether the common law revenue rule "was intended" to preclude suits for violations of some undefined "U.S. statutory law," but whether RICO (or some other "U.S. statutory law," to use the Republics' term) "speaks directly" to the rule's ban on direct and indirect attempts to collect foreign taxes. *See United States v. Texas*, 507 U.S. 529, 534 (1993); *Honduras*, Pet. App. at 13; *Attorney General of Canada*, 268 F.3d at 128. Not even the Republics contend that it does, and the reason is clear: every court to consider the issue has agreed that neither RICO nor its legislative history contain any suggestion that Congress intended to abrogate the rule.

The Court of Appeals' decision in *Pasquantino* is not to the contrary. *Pasquantino* held only that the revenue rule was not implicated by a criminal prosecution by the U.S. government under the wire fraud statute, siding with the Second Circuit in a six-year old circuit split on this issue. Compare *Boots*, 80 F.3d at 587 (applying the revenue rule to bar wire fraud prosecution for smuggling scheme because court must pass on validity and operation of foreign revenue laws) with *United States v. Trapilo*, 130 F.3d 547, 553 (2d Cir. 1997) (rejecting contention that wire fraud prosecution for smuggling scheme implicates revenue rule because validity of foreign revenue law not at issue). In reaching *that* conclusion, the Court of Appeals was careful

to distinguish a criminal prosecution by the U.S. government from suits like those brought by the Republics here that seek enforcement of foreign revenue laws. Thus, *Pasquantino* specifically observed the "critical point" that a prosecution by the U.S. "does nothing to enforce any tax judgments or *claims*" that the foreign sovereign has against a defendant. *Id.* at 331 (emphasis added). "Neither does such prosecution enforce the revenue laws of the foreign sovereign involved." *Id.* And to the extent such prosecution raises matters of foreign relations, they can be resolved by the Executive, who has made the decision to indict. *See id.*

Here, by contrast, the RICO actions by the Republics "fundamentally deal with the adjudication of foreign tax claims," "seek to collect [their] unpaid taxes," and "seek redress for violations of the Republics' tax laws," raising issues that are "necessarily allocated to the political branches for resolution." *Honduras*, Pet. App. at 7-8. Two Courts of Appeals have considered whether the revenue rule bars such actions, and both have agreed that it does. Both found that the revenue rule has long barred any attempt by foreign governments to use U.S. courts to recover foreign taxes and that there is no indication in RICO or its legislative history that Congress intended to change that result. *Id.* at 12, 14; *Attorney General of Canada*, 268 F.3d at 106.[3]

Confronted with the absence of a conflict in the holdings of the Courts of Appeals, the Republics try to manufacture a conflict by asserting that *Pasquantino* somehow "disagreed"

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3. That the split regarding criminal enforcement of the wire fraud statute has no bearing on the question raised by this petition is confirmed by the Solicitor General, who stated in *Attorney General of Canada* that "[t]he conflict of the circuits on that question is not at issue here." Brief for the United States as Amicus Curiae, No. 01-1317, at 16 n.3.

with *Attorney General of Canada* regarding application of the revenue rule. In fact, just the opposite is true. The Court of Appeals in *Pasquantino* expressly *endorsed* the Second Circuit's statement that the revenue rule is "'a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns.'" *Id.* at 327 (quoting *Attorney General of Canada*, 268 F.3d at 109)). The Court of Appeals applied the same formulation of the revenue rule below, *see* Pet. App. at 6 (citing *Attorney General of Canada*), as have courts around the world for more than two centuries.

* * *

Given that the Courts of Appeals are in agreement that a foreign government may not directly or indirectly enforce its revenue laws in U.S. courts, the Republics' claim that the circuits are "in manifest disarray as to the 'proper scope' of the revenue rule," Pet. at 9, is pure hyperbole. Although a split exists on the issue whether the revenue rule prohibits the U.S. government from recognizing a foreign revenue law in a *criminal* prosecution under the wire fraud statute, that split did not matter in *Attorney General of Canada*, and it does not matter here.

II. The Republics Misstate the Impact of the Decision Below.

The Republics' arguments about the impact of the decision below on the justiciability of cases with foreign relations overtones are easily disposed. First, the Republics contend that, if left unreviewed, the decision below "would close the doors to friendly foreign governments" and "subvert settled expectations as to access by foreign sovereigns to U.S. courts. . . ." Pet. at 10. But these statements prove too much.

The Republics' alleged desire to permit "friendly foreign governments" access to our courts only underscores the need for leaving such decisions to the political branches, because courts cannot apply one set of rules for friends and another for foes. *See, e.g.*, *Boots*, 80 F.3d at 588 ("We do not condone defendants' smuggling activities, nor do we question Canada's revenue laws or the desirability of cooperation in respect to our mutual border. But application of the wire fraud statute to a scheme of this type does not, and cannot, turn upon our attitude towards Canada alone."). And "friendly foreign governments" can have no "settled expectations" about access to U.S. courts to enforce a foreign tax claim when the Republics cannot even point to a single case anywhere in the world in which such access has been allowed.

Next, the Republics contend that the decision below "could conceivably give rise to new forms of the act of state and political question doctrines that have not been countenanced by this Court in nearly half a century." Pet. at 10. But this is just another attempt by the Republics to create a certworthy issue where none exists. The Court of Appeals never even mentioned the act of state or political question doctrines. Rather, it merely cited *Baker v. Carr*, 369 U.S. 186 (1962) and *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) for the unremarkable proposition that "[u]nder the Constitution, the power to conduct foreign relations is allocated to the political branches." *Honduras*, Pet. App. at 12. After invoking this proposition, moreover, the Court of Appeals observed that the political branches have yet to provide the Republics with a mechanism to collect foreign taxes, either by treaty or express statutory provision, a result fatal to their claims. *See id.* This does not "extend the revenue rule in a manner inconsistent with its common law history and purpose," Pet. at 14; rather, it enforces the rule just as it has operated for nearly three centuries.

III. The Revenue Rule is Not Preempted by RICO.

The Republics' final argument—that "[e]ven if the revenue rule would otherwise apply, it is preempted by the plain language of RICO"—has no basis in law or fact. It proceeds from a false premise: that the revenue rule's bar on the enforcement of foreign tax claims was not well established at the time Congress enacted RICO. *See* Pet. at 18. But all of the authorities are otherwise. *See Honduras*, Pet. App. at 14 ("Little question exists that the revenue rule is a 'long-established and familiar principle'" (quoting *Attorney General of Canada*, 268 F.3d at 111-12)); *Attorney General of Canada*, 268 F.3d at 126 ("it is clear that the revenue rule was well established by that date").

Because the revenue rule was firmly established in the common law, Congress could have abrogated it when enacting RICO only by "speaking directly" to the rule. "[W]here a common-law principle is well established . . . the courts may take it as [a] given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal quotation omitted) (citations omitted). As this Court explained in *Astoria*, where the common law rule at issue protects "weighty and constant values," courts properly require a clear statement of Congress's intent to supplant that rule. *Id.* "In such cases, Congress does not write upon a clean slate. . . . In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)) (citation omitted). Here, moreover, the burden is on the Republics to overcome the presumption favoring the preservation of settled common-law rules.

See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").[4]

Applying these principles, the Eleventh Circuit below and the Second Circuit in *Attorney General of Canada* held that there is no language in RICO, much less a clear statutory statement, evincing any intention by Congress to abrogate the revenue rule: "the Republics have not demonstrated, nor has this court discovered, any evidence of a statutory purpose in the RICO statute that would except actions brought under it from the strictures of the revenue rule." *Honduras*, Pet. App. at 14; *Attorney General of Canada*, 268 F.3d at 129 ("RICO and its legislative history offer no hint that Congress intended the statute to afford a civil remedy to foreign nations for the evasion of foreign taxes. . . . For the statute to change such a time-honored common law prudential rule, it must 'speak directly' to the matter; yet it does not.").

Citing *United States v. Texas*, the Republics pay lip service to the requirement that a statute "speak directly" to

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4. This Court has also required Congress to state clearly its intent to require courts to adjudicate matters that touch on foreign relations. For instance, in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), the court declined to extend U.S. labor laws to controversies involving a foreign ship in a U.S. port: "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." *Id.* at 147; *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (applying Benz clear statement rule); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (noting that *McCulloch* declined "to read the National Labor Relations Act so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations").

an issue addressed by the common law in order to change it. But they never claim that Congress spoke directly to the revenue rule; rather, they claim that RICO and "analogous statutes" authorize "foreign law enforcement" of "tax laws." Pet. at 16. The problem is that none of the statutes cited by the Republics supports this contention. For example, the Republics cite 31 U.S.C. § 210(b)(2)(F), but that statute simply authorizes the director of Financial Crimes Enforcement Network in the Department of the Treasury to "assist Federal, State, local, and foreign law enforcement and regulatory authorities in combating the use of informal, nonbank networks and payment and barter system mechanisms that permit the transfer of funds or the equivalent of funds without records and without compliance with criminal and tax laws." Pet. App. at 56-57. It says nothing whatsoever about the ability of a foreign government to press a claim for foreign taxes in U.S. courts.[5]

The Republics also make the half-hearted argument that Congress "reaffirmed that RICO creates the causes of action pleaded here" when it rejected a "rule of construction" in the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, a provision that would have confirmed that the Patriot Act should not be read "to expand" the jurisdiction of any U.S. court to hear revenue claims by foreign governments. *See* Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th

5. Indeed, the only statutory provision cited by the Republics directed to smuggling is a provision in RICO that defines "specified unlawful activity" as follows: "with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving . . . smuggling or export control violations involving items on the Unites States Munitions List . . . or an item controlled under the Export Administration Regulations. . . ." 18 U.S.C. § 1956(c)(7)(B)(v). Cigarettes, of course, are not controlled items on the Munitions List or Export Administration Regulations.

Cong. § 106(b) (2001). This argument, which the Republics never raised with the district court, and which they raised for the first time in a reply brief in the court below, was correctly dismissed out of hand: "'The act of refusing to enact a law . . . has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.'" *Honduras*, Pet. App. at 16 (quoting *United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring)); *see also Romani*, 523 U.S. at 534 (a failure to enact a legislative proposal "provide[s] no support for the hypothesis that both Houses of Congress silently endorsed" the opposite proposition).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 03-686

DEC 15 2003

In The

Supreme Court of the United States

THE REPUBLIC OF HONDURAS, THE REPUBLIC OF ECUADOR and THE REPUBLIC OF BELIZE,

Petitioners,

vs.

PHILIP MORRIS COMPANIES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The dispute between the parties is clearly drawn. The Respondents assert repeatedly (31 times by our count) that this is an action "by foreign governments to enforce their tax laws" (Brief in Opposition at 2; see id. at 1-12). The Petitioners counter that this action was brought for violation of the unambiguous language of a United States criminal statute, based on the conduct primarily of United States corporations, primarily in the United States, in which one (admittedly major) element of the damages is the foreign taxes which the Respondents should have paid.

The Respondents also assert repeatedly that the permissibility of this action is "committed by the U.S. Constitution to the political branches of government" (id. at 8; see id. at 4, 5, 8, 11, 13). The Petitioners counter that it was Congress, a political branch of government, which enacted RICO, 18 U.S.C. Chapter 96, whose unambiguous language creates the cause of action asserted.

The Respondents contend that "the revenue rule was firmly established in the common law" when Congress enacted RICO (id. at 14). The Petitioners counter that whether or not the rule in concept was firmly established, the wide ambit ascribed by the Respondents has never been, and certainly has never been confirmed by this Court. Its "applicability" in the specific context at issue "has never been established with such force and clarity as to supplant Congress' plain language in enacting both the underlying criminal statutes which were violated in this case, and the RICO statute which creates the Petitioners' causes of action" (Petition at 3).

Therefore, the issues remain 1) whether the revenue rule was ever intended to prohibit actions brought by

foreign sovereigns in the United States' courts under United States' statutes, against United States corporations, for unlawful conduct occurring in the United States; and 2) even if the revenue rule should have such reach, was "its applicability" so firmly established at the time RICO was enacted as to imply Congressional intention to retain it, notwithstanding the admittedly unambiguous language of RICO?[1]

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[1] Before entering the argument, we need to correct three factual misstatements by the Respondents. First, the Amended Complaint does allege that "bank accounts in Miami, Florida owned by various RJR cigarette distributors, were frozen by United States law-enforcement officials because funds credited to those accounts represented laundered drug money" (R-98, ¶107) (compare the Brief in Opposition at 3 n. 1 ("these patently false allegations are nowhere found in the amended complaints")).

Second, the Petitioners' central argument – that the revenue rule was never intended to preclude suits against U.S. corporations for the violation of U.S. statutes – was hardly "waived by not raising it before the Court of Appeals . . ." (Brief in Opposition at 9). See Consolidated Brief of Appellants Republic of Honduras, Republic of Ecuador and Republic of Belize at 7, 8, 10, 14, 15, 16, 17, 25, Case No. 02-11735-GG, United States Court of Appeals for the Eleventh Circuit, June 10, 2002.

Third, the Petitioners' invocation of the U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, was not made for the first time in its reply brief in the appellate court (Brief in Opposition at 17). See Consolidated Brief at 30 ("The Patriot Act expands RICO, particularly as it concerns money laundering as a predicate act, 18 U.S.C. §1956(c)(7). In adopting it, the Congress rejected a rule of construction which would have expressly adopted the revenue rule"); see also id. at 30-31.

ARGUMENT

1. The Unsettled Law on the Common Law Revenue Rule. Although the Respondents have forcefully contended that the Court of Appeals made the right decision, they offer only conclusory assertions that it rests on unanimous, settled and coherent principles. As two courts have noted (see Petition at 8), the purported distinction between criminal and civil statutory prosecutions (see Brief in Opposition at 2, 10-11) is illusory, given that both are based on the decision of a political branch of government in promulgating the statute. See *United States v. Pasquantino*, 336 So.2d 321, 330-31 (4th Cir. 2003) (en banc) (quoted below); *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996), *cert. denied*, 519 U.S. 905 (1996) ("In the end, all the arguments based on the revenue rule's functions apply, if at all, with equal force in both the criminal and civil contexts"). See also *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 139 (2nd Cir. 2001) (Calabresi, J., dissenting), *cert. denied*, 537 U.S. 1000 (2002) (majority's attempt to distinguish criminal cases necessarily "founders in the face of the Supreme Court's consistent refusal to treat criminal and civil RICO actions differently"). As noted (Petition at 2, 8, 9), contrary to the Respondents' contention (Brief in Opposition at 2), *Pasquantino* rejects any such distinction, in holding that a wire-fraud prosecution, "even when the subject . . . is certain tax revenue due a foreign sovereign, does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant," but rather "seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest . . . ." Id. at 331. These decisions alone preclude the

Respondents' claim of unanimity and coherence in the federal system. And as we noted (Petition at 10-14), this dissonance is only magnified in the context of larger doctrines of justiciability.

The Respondents find these concerns "easily disposed" (Brief in Opposition at 12), trusting in the "decisions [of] the political branches" (id. at 13) to determine when the constitutional guarantee of foreign sovereigns' access to our courts should be honored (see Petition at 11) – and with it the underlying principles of comity and reciprocity (see Petition at 11-12) – notwithstanding their acknowledgment that the "Court of Appeals never even mentions the act of state or political question doctrines" (Brief in Opposition at 13). The Respondents' confidence in such situational political decisionmaking, like its earlier confidence in the scope and logic of the revenue rule, connotes little more than faith. It provides no comfort that such weighty matters will work themselves out in the absence of this Court's guidance.

2. RICO's Unambiguous Language Preempts the Revenue Rule. The Respondents offer no disagreement that the unambiguous language of RICO creates the Petitioners' pleaded cause of action. They do not disagree that under 18 U.S.C. §1964(c), the Plaintiff Republics qualify as "person[s] injured in [their] business or property by reason of a violation of section 1962," nor that their complaints allege violations of §1962 – mail fraud, wire fraud, money laundering and conspiracy. Nor do the Respondents question the decisions of this Court holding that even a pre-existing common-law cause of action must yield to unambiguous statutory language (see Petition at 16-17). These decisions reflect the "interpretive presumption" that "Congress is understood to legislate against the

background of common-law adjudicatory principles" – a presumption which does not "entail[] a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citation omitted). The Respondents invoke only the qualification that "where a common-law principle is *well established* . . . the courts must take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident,'" id. at 108 (emphasis added), quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

The Respondents contend that the *Astoria* qualification is satisfied because "the revenue rule was firmly established in the common law" when Congress enacted RICO (Brief in Opposition at 14). But the question is not whether the rule was well established in concept, but rather in the particular context at issue – whether its asserted application – to pre-empt a federal statutory condemnation of conduct in the United States, in which foreign tax revenue is one measure of damages – was itself "firmly established" when RICO was enacted. As the Respondents acknowledge (Brief in Opposition at 1), before *Attorney General of Canada* in 2001, only one American court had ever enforced the rule in that context – *United States v. Boots* in 1996 (forbidding a criminal prosecution for wire fraud assertedly intended to defraud the Canadian government of tax revenues). Every other decision enforcing the revenue rule, including those cited by the Respondents (Brief in Opposition at 6-8), forbid non-statutory claims to collect foreign taxes – either

directly or indirectly. At the time RICO was enacted, no decision had held that the rule can pre-empt a federal statute. It cannot be said that Congress was legislating against a "well established" common-law doctrine which, if enforced, would provide an exception to the unambiguous statutory language it was promulgating. The Respondents' only argument – that the revenue rule in concept was well established at the time – is wholly unresponsive, and begs the two questions presented to this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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